TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 481.

ADDISON JOHNSON, AGENT AND WARDEN OF THE STATE PRISON OF THE STATE OF NEW YORK AT SING SING, N. Y., APPELLANT,

vs.

CHARLES C. BROWNE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 2, 1906.

(20446.)

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1 *To the Circuit Court of the United States for the Southern District of New York.*

The petition of Charles C. Browne respectfully shows:

I. That petitioner is now in the custody of Addison Johnson, agent and warden of the State prison of the State of New York at Sing Sing, in the State of New York, and is there incarcerated and detained against his will by the said agent and warden.

II. The sole claim or authority by virtue of which the said Addison Johnson, agent and warden as aforesaid, so restrains and detains petitioner is by virtue of a certain commitment and mandate, in writing, a copy of which is hereto annexed marked "A."

III. That the said commitment was issued pursuant to an order of this court made and entered at a stated term thereof held at the post-office building in the city of New York on the 19th day of January, 1906, a copy of which said order is hereto annexed marked "B."

IV. That heretofore and on the 20th day of February, 1904, your petitioner was tried and convicted in the said Circuit Court of the crime of conspiring to defraud the United States of duties on imports. That the said conviction was thereafter duly affirmed by the Circuit Court of Appeals for the Second Circuit.

V. That thereafter, on a mandate from the said Circuit Court of Appeals, an order was entered in this court making the judgment of the said Circuit Court of Appeals the judgment of this court. That thereupon a mandate was issued to William Henkel, United States marshal, for execution.

2 VI. That subsequently extradition proceedings for the surrender of your petitioner were instituted by the Government of the United States and demand made upon the authorities of the Dominion of Canada for the delivery of the body of the said Charles C. Browne to the duly appointed agent of the United States in that behalf upon the said charge of conspiracy, for which your petitioner had been so as aforesaid convicted.

VII. That thereafter the surrender of the said Charles C. Browne upon the said charge of conspiracy, for which he had been so convicted as aforesaid, was on or about the 12th day of May, 1906, denied by the government of the Dominion of Canada.

VIII. That subsequently extradition proceedings were again instituted by the Federal Government for the surrender of the said Charles C. Browne upon a charge of knowingly admitting the entry of goods, wares, and merchandise upon the payment of less than the amount due thereon, a violation of section 5444 of the Revised Statutes of the United States, upon which charge an indictment had been filed in this court on the 2nd day of April, 1903.

IX. That subsequently and on the 25th day of July, 1906, the surrender of the said Charles C. Browne upon the charge last above mentioned was duly granted by the said government of the Dominion of Canada, and the body of the said Charles C. Browne was delivered to one William Flynn, the duly appointed agent of the United States of America in that behalf.

X. That thereafter the said William Flynn, as such agent as afore-

said, brought the body of the said Charles C. Browne into the State of New York, when, in violation of the rights of petitioner and in violation of the treaty obligations between the United States of America and Great Britain, the said William Henkel, such
3 marshal as aforesaid, acting under the warrant and mandate so issued by this court upon the conviction aforesaid, caused your petitioner to be surrendered and turned over to the said Addison Johnson, such agent and warden as aforesaid, for the purpose of executing the sentence of imprisonment heretofore imposed upon him.

XI. That the said imprisonment and detention is in violation of Article III and Article VII of the treaty between the United States of America and Her Britannic Majesty of July 12th, 1889, which said articles are as follows—that is to say:

"Article III. No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offence, committed prior to his extradition, other than the offence for which he was surrendered until he shall have had an opportunity of returning to the country from which he was surrendered."

"Article VII. The provisions of the said tenth article and of this convention shall apply to persons convicted of the crimes therein respectively named and specified whose sentence therefor shall not have been executed."

As is hereinabove stated, the offence for which your petitioner has been committed to the said State prison is not the effence for the commission of which his surrender was granted, but, on the contrary, it appears that his surrender for the said offence was directly refused.

XII. That your petitioner has been advised by his counsel and verily believes that for the reasons above stated his commitment to the custody of the said agent and warden as aforesaid was without legal right, authority, or jurisdiction of any kind and was utterly void and ineffectual and in violation of law and in violation of the treaty obligations aforesaid.

4 Wherefore your petitioner prays a writ of habeas corpus may be issued directed to the said Addison Johnson, esq., such agent and warden as aforesaid, or to any of his deputies or assistants, requiring him or them to bring and have your petitioner before this court at a time to be by it determined, together with the true cause of his detention, to the end that public inquiry may be had in the premises and that this court may proceed in a summary way and determine the facts of the case in that regard and the legality of the imprisonment of the said Charles C. Browne, and thereupon to dispose of the said petition as law and justice require.

And your petitioner will ever pray.

Dated at the city of New York, this 30th day of July, 1906.

CHAS. C. BROWNE.

STATE OF NEW YORK,
County of Westchester.

Charles C. Browne, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his

own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHAS. C. BROWNE.

Sworn to before me this 30th day of July, 1906.

[SEAL.] D. J. HICKEY,
Notary Public, Westchester Co., N. Y.

5 "A."

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States court rooms, in the city of New York, on Wednesday, the 9th day of March, in the year of our Lord one thousand nine hundred and four.

Present: The honorable Edward B. Thomas, judge.

THE UNITED STATES *vs.* CHARLES C. BROWNE, IMPLEADED. } Sec. 5440, U. S. Rev. Stat., as am. by act of May 17, 1897, I Supp. 264. Conspiracy.

On motion of the United States attorney, ordered sentence.

The court thereupon proceeds to pass judgment and sentence the prisoner, Charles C. Browne, to be imprisoned for a period of two years.

Sentence to be executed at the Sing Sing prison.

BY THE COURT.

Attest:
JOHN A. SHIELDS, *Clerk.*

Defendant, Charles C. Browne, discharged on bail to amount on appeal.

March 9, 1904.

JOHN A. SHIELDS, *Clerk.*

6 "B."

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States court rooms, in the city of New York, on the nineteenth day of January, in the year of our Lord one thousand nine hundred and six.

Before the Hon. Edward B. Thomas, judge.

THE UNITED STATES OF AMERICA *vs.* CHARLES C. BROWNE. }

This cause having been heretofore tried and judgment of conviction having been rendered by this court on the 9th day of March, 1904, sentencing the defendant, Charles C. Browne, to two (2) years

imprisonment at hard labor, sentence to be executed at Sing Sing prison,

And the defendant having thereafter, by writ of error, obtained the record and proceedings therein, with all things concerning the same, to be removed to the United States Circuit Court of Appeals for the Second Circuit, for review of the aforesaid judgment and proceedings, and the said United States Circuit Court of Appeals having transmitted its mandate, bearing date December 19th, 1905, by which it appears that the said cause at the October term for 1905 came on to be heard before the said Circuit Court of Appeals, and was argued by counsel, and on consideration thereof it was ordered and adjudged by the said United States Circuit Court of Appeals that the aforesaid judgment of the said Circuit Court in this cause be affirmed.

Now on reading and filing said mandate, and on motion of
7 Henry L. Burnett, United States attorney for the Southern District of New York, it is

Ordered, adjudged, and decreed that the said judgment of the said United States Circuit Court of Appeals for the Second Circuit be, and the same is hereby, made the judgment of this court, and that the same be executed and enforced according to the tenor thereof aforesaid.

EDWARD B. THOMAS, *U. S. Judge.*

(Endorsed:) U. S. Circuit Court. In the matter of Charles C. Browne. Petition. Black, Olcott, Gruber & Bonynge, attorneys for petitioner, 170 Broadway, New York City. Exhibited to me 7/30/06, C. M. H., D. J. U. S. Circuit Court, Southern District New York. Filed Jul. 30, 1906. John A. Shield, clerk.

8 STATE OF NEW YORK,
County of New York, City of New York, ss:

Roscoe C. Peck, being duly sworn, deposes and says: That he is over the age of 21 years. That on the 31st day of July, 1906, at the State prison of the State of New York, in the town of Ossining, State of New York, owing to the absence of Addison Johnson, agent and warden of said prison, he served the writ of habeas corpus hereto annexed on James Connaughton, principal keeper and person in charge of said prison, by handing to and leaving with said Connaughton a true copy of said writ and at the same time exhibiting to him the original writ hereto annexed.

ROSCOE C. PECK.

Subscribed and sworn to before me this 1st day of August, 1906.

[SEAL.] EDW. M. MCINNES,
Notary Public, N. Y. Co. No. 81.

9 *The President of the United States, to Addison Johnson, agent and warden of the State prison of the State of New York, greeting:*

We command you that you have the body of Charles C. Browne, by you imprisoned and detained in this State, together with the time and

cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the Circuit Court of the United States in and for the Southern District of New York, in the Second Circuit, on the 7th of August, 1906, at 10.30 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the said Charles C. Browne, and have you then and there this writ.

Witness Hon. Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, this 30th day of July, in the year one thousand nine hundred and six.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

The foregoing writ is hereby allowed.

C. M. HOUGH,
U. S. Dist. Judge, So. Dist. N. Y.

(Endorsed:) U. S. Circuit Court. In the matter of Charles C. Browne. Writ of habeas corpus. Black, Olcott, Gruber & Bonynge, attorneys for petitioner, &c., 170 Broadway, New York City. Let the petitioner be discharged from his present custody. Opinion filed Aug. 14, 1906. C. M. Hough, D. J. U. S. Circuit Court, Southern District New York. Filed Aug. 14, 1906. John A. Shields, clerk.

10 [State of New York. Sing Sing prison. Addison Johnson, agent and warden.]

OSSINING, *August 7th, 1906.*

To the President of the United States of America:

I, the undersigned, agent and warden of Sing Sing prison, at Ossining, N. Y., do hereby certify and make return to the annexed writ of habeas corpus, issued out of the United States District Court on the 30th day of July, 1906; and for a return thereof I respectfully set forth and allege:

1st. That I received the said writ of habeas corpus on the first day of August, 1906, and at the time of the service thereof there was, and is now, in my custody the body of one Charles C. Browne, whom I believe to be the prisoner named therein.

2nd. I also set forth and certify that the said Charles C. Browne is in my custody and imprisoned and detained by me at the said Sing Sing prison by virtue of the final judgment of the Circuit Court of the United States of America for the Southern District of New York, duly rendered against the said Charles C. Browne on the 9th day of March, 1904, on conviction of a felony, copy of said judgment being hereto annexed and made part of this return; and in compliance with said writ of habeas corpus I now produce and present to this court the body of said Charles C. Browne.

ADDISON JOHNSON,
Agent and Warden, Sing Sing Prison.

11 At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States court rooms in the city of New York on the nineteenth day of January, in the year of our Lord one thousand nine hundred and six.

Present, the Hon. Edward B. Thomas, judge.

THE UNITED STATES OF AMERICA
vs.
CHARLES C. BROWNE.

This cause having been heretofore tried and judgment of conviction having been rendered by this court on the 9th day of March, 1904, sentencing the defendant, Charles C. Browne, to two (2) years imprisonment at hard labor, sentence to be executed at Sing Sing prison.

And the defendant having thereafter, by writ of error, obtained the record and proceedings therein, with all things concerning the same, to be removed to the United States Circuit Court of Appeals for the Second Circuit for review of the aforesaid judgment and proceedings, and the said United States Circuit Court of Appeals having transmitted its mandate bearing date December 19th, 1905, by which it appears that the said cause at the October term for 1905 came on to be heard before the said Circuit Court of Appeals, and was argued by counsel, and on consideration thereof it was ordered and adjudged by the said United States Circuit Court of Appeals that the aforesaid judgment of the said Circuit Court in this cause be affirmed.

Now, on reading and filing said mandate, and on motion of Henry L. Burnett, United States attorney for the Southern District of New York, it is

12 Ordered, adjudged, and decreed that the said judgment of the said United States Circuit Court of Appeals for the Second Circuit be, and the same is hereby, made the judgment of this court, and that the same be executed and enforced according to the tenor thereof aforesaid.

EDWARD B. THOMAS,
U. S. Judge.

(Endorsed:) United States Circuit Court, Southern District of New York. The United States of America *vs.* Charles C. Browne. Order on mandate. Henry L. Burnett, U. S. attorney, attorney for United States, P. O. building, N. Y. City. U. S. Circuit Court, Southern District New York. Filed Jan. 19, 1906. John A. Shields, clerk.

A copy.
[SEAL.]

JOHN A. SHIELDS, *Clerk.*

13 No. 3953. U. S. Circuit Court.

THE UNITED STATES *vs.* CHARLES C. BROWNE.	Charged with and convicted of conspiracy, sec. 5440 U. S. R. S., as amended by act of May 17, 1897, I Supp. 264, and sentenced to be imprisoned for a term of two (2) years, sentence to be executed at the Sing Sing prison.

The above-named defendant is hereby delivered by me into the custody of the warden of Sing Sing prison, in pursuance of the statutes in such cases made and provided.

July 26th, 1906.

WILLIAM HENKEL,
United States Marshal for the Southern District of New York.

Officer Blake.

14 At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States court rooms in the city of New York, on Wednesday, the 9th day of March, in the year of our Lord one thousand nine hundred and four.

Present: The Honorable Edward B. Thomas, judge.

THE UNITED STATES *vs.* CHARLES C. BROWNE, IMPLEADAD.	Sec. 5440, U. S. Rev. Stat., as amended by act of May 17, 1897, I Supp. 264. Conspiracy.

On motion of the United States attorney, ordered sentence.

The court thereupon proceeds to pass judgment and sentence the prisoner, Charles C. Browne, to be imprisoned for a period of two years.

Sentence to be executed at the Sing Sing prison.

BY THE COURT.

Attest:
JOHN A. SHIELDS, *Clerk.*

Defendant Charles C. Browne discharged on bail to amount , on appeal, March 9th, 1904.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District New York. Filed Aug. 14, 1906. John A. Shields, clerk.

15 Circuit Court of the United States, Southern District of New York.

In the matter of Charles C. Browne.

On habeas corpus.

Henry L. Stimson, esq., district attorney (W. Wickham Smith, esq., special district attorney), for the United States.

Messrs. Black, Olcott, Gruber & Bonynge (Messrs. Olcott and McManus), for the relator.

HOUGH, J.

In the year 1903, several indictments were found by the grand jury of this district against the relator.

In one he was charged with conspiring to defraud the United States of duties upon imports, and in another with procuring the admission of goods into the United States in violation of Revised Statutes, section 5444.

Upon the conspiracy charge Browne was duly convicted and sentenced to a term in the prison at Sing Sing. This conviction was affirmed upon appeal, and an application for certiorari to the Supreme Court refused.

Upon the charge under section 5444 he has never been tried.

16 Browne having been released on bail pending appeal, fled to Canada after the affirmance of his conviction. Thereupon the United States demanded his extradition as a convict, pursuant to our extradition convention of 1889 with the Government of Great Britain. This demand was refused.

Immediately a new demand was made, based upon the old indictment for violation of section 5444. This requisition Canada honored and delivered Browne to the proper officer, with whom he was travelling toward this city, when he was arrested on the railroad train under a warrant based upon the conspiracy conviction, taken away from the extradition officer who had him in charge, and lodged in Sing Sing, whence he has been brought under this writ alleging that his incarceration is in violation of the obligations of the United States under the Ashburton treaty of 1842, as extended by the abovementioned convention of 1889, and therefore in violation of the supreme law of the land.

The return to the writ shows no warrant for holding Browne in prison other than his regular commitment under the conspiracy conviction.

Counsel having discovered no instance later than Miller's case (23 Fed. Rep., 32) of the extradition of a convict upon an untried charge followed by imprisonment under his conviction.

Miller was before Judge Acheson in 1885, and governmental action substantially identical with that taken here was distinctly approved.

The celebrated case of Rauscher, 119 U. S., 407, was argued early in 1886, and the court does not advert to Judge Acheson's

17 ruling. This omission of so important an instance from so thorough a review of the whole subject of extradition can only have occurred because Miller's case was not reported in time for consideration.

It is now brought forward as justification for the manner of Browne's incarceration. Such claim can not be sustained, for Miller may have been, and Browne may be, lawfully detained, but not for the reasons advanced by Judge Acheson, whose whole opinion is based on the decisions carefully considered and decisively overruled in the Rauscher case.

The learned counsel for the Government remind the court that since 1885 no facts like the present have arisen for judicial consideration, and while admitting that the judgment in Rauscher's case has for twenty years rendered it unlawful to try a person surrendered in extradition for any offence committed prior to surrender other than that specified in the demand for extradition, assert:

1st. That upon the true construction of the Rauscher case it is lawful to apprehend an escaped convict even though at the time of apprehension he has been brought within this country solely by virtue of a demand in extradition wholly unconnected with the crime for which he became a convict; and

2nd. That such right to seize convicts is especially secured to our Government in its relations with the King of Great Britain and Ireland by the terms of the Ashburton treaty of 1842, as supplemented by the extradition convention of 1889—the latter instrument, be it noted, having come into existence since the Rauscher decision.

18 The arrest of Browne under the circumstances above recited certainly constitutes a vigorous assertion of this doctrine. Counsel have respectively laid stress upon the manner of Browne's flight to his Canadian asylum and the " trick " of getting him within the reach of the warrant now holding him in prison, upon the pretence of wanting him upon another charge.

These considerations, however, are all circumstances of inflammation, for neither the manner or time of Browne's escape nor the intent behind his enforced return are material to the present inquiry. They suggest subjects fit for diplomatic rather than for judicial consideration. The sole question here presented is not whether that which has been done is wrong or tricky or injudicious, but whether it is unlawful.

Concededly the facts submitted are very different from those considered in the case of Rauscher, but I can not concur in the narrow view of that famous decision now urged upon me. The Supreme Court there found great contrariety of opinion not only among judges, but diplomats, as to what might or might not be done to persons delivered upon demands in extradition; it had under especial consideration the Ashburton treaty, which on these points is entirely silent, and it must have been aware that the action of this court in the case of Lawrence (so elaborately considered in the Rauscher opinion) had resulted in a refusal to the part of Lord Derby to honor our demand for the surrender of one Winslow unless the United States would especially covenant to do nothing and permit nothing to be done to Winslow except try him for the offense for which

19 his surrender was requested, a position in which Secretary Fish found it inconsistent with the dignity of this country to acquiesce.

Such situation called for and received what I must regard as a declaration of principles by a coordinate branch of our Government and a chart in all matters of extradition, not grounded upon mere legality, but resting on foundations of national honor.

The sum of the doctrine declared is, in the language of the court, that—

"this right (of extradition), the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made; it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them."

Nor are decisions wanting in which the broadest significance has been given to the judgment containing these vigorous expressions.

In re Reinitz (39 Fed. Rep., 204) Judge Brown, of this district, discharged from custody a man arrested on civil process immediately after his acquittal of the charge of forgery, upon which he had been extradited, remarking that the case of Rauscher had definitely settled that an extradited person "can not be arrested or tried" for any offense committed prior to extradition other than that for which he had been surrendered.

In re Baruch (41 Fed. Rep., 472) the same distinguished jurist quoted the above extract from the Rauscher opinion and applied it to the case of one who had been haled from New Jersey to New York, in order that he might be extradited, and upon his discharge and before returning to New Jersey had been arrested in civil process for the same cause as that for which his extradition had been demanded. He further referred with approval to the opinion of Governor Hill of this State in the case of Hope (7 N. Y. Crim. Rep., 406), who, speaking of the Rauscher judgment, says:

"The true theory which now seems to be firmly established is that a State should not be allowed to obtain jurisdiction of the fugitive from justice and then to take advantage of jurisdiction thus obtained and to use it for another and a different purpose."

In Hall vs. Patterson (45 Fed. Rep., 352), the late Judge Green, of New Jersey, expressed his view of the Rauscher case by saying that after one delivered in extradition be tried and acquitted "he is entitled to have granted to him a reasonable time in which to leave the country before he can be arrested and held to answer for any other crime committed before extradition."

It is also to be remembered that the Rauscher judgment proceeds not only "upon the ground of a right given impliedly by the terms of the treaty between the United States and Great Britain" (although the Ashburton treaty is entirely silent on the subject), but also given "expressly by the acts of Congress in the case of a fugitive surrendered to the United States by a foreign nation." (Lascelles vs. Georgia, 148 U. S., at 542.)

The acts referred to are sections 5272 and 5275, Revised Statutes, and they remain to-day as they were in 1886, a "Congressional con-

struction" of extradition treaties (i. e., of all extradition
21 treaties) "binding upon the judiciary," such construction requiring that a person brought into this country upon extradition "shall not be arrested or tried for any other offence than that with which he was charged in extradition until he shall have had a reasonable time to return unmolested to the country from which he was brought." (U. S. vs. Rauscher, supra.)

It is idle to attempt distinctions between convicts and persons indicted, arrests on mesne process and final commitments, between civil and criminal proceedings. The Rauscher judgment, as well as subsequent interpretations thereof, fully warrant the doctrine approved by Sir Edward Clarke in his work on Extradition—that the person extradited can not be "detained" for any other than the extradition offence until he has had a reasonable opportunity to return to the delivering country.

It remains to consider the contention that the rule above set forth has been (as to Great Britain at all events) abrogated by the convention of 1889.

If it were not for sections 5272 and 5275, Revised Statutes, and the construction given thereto by the Supreme Court, the argument would have more weight; but it was distinctly held that these statutes alone were sufficient to uphold the doctrine of the Rauscher case, and Justice Gray gave his adherence thereto solely upon that construction.

Unless, therefore, the convention of 1889 has abrogated the statutes as well as superseded the doctrine based upon the right "implied" from the Ashburton treaty, the rule must remain the same.

Article 2d of this convention, after providing that no surrender shall take place if the offense in respect to which surrender is
22 demanded "be one of a political character," declares that no person surrendered by either of the high contracting parties to the other shall be triable or tried or be punished for any political crime or offence or for any act connected therewith, previously to his extradition."

Article 3d declares that "no person surrendered by or to either of the high contracting parties shall be triable or tried for any crime or offence committed prior to his extradition other than the offence for which he was surrendered until he shall have had an opportunity of returning to the country from which he was surrendered."

Article 7th declares that "the provisions of the said 10th article (i. e., of the Ashburton treaty) and of this convention shall apply to persons convicted of the crimes therein respectively named and specified whose sentence therefor shall not have been executed."

It is strenuously contended that the omission of the word "punished" from article 3d above quoted leaves the United States free to punish by imprisonment a convict found within its borders, even if at the time of his apprehension he is within the country solely under a warrant in extradition.

But these treaty provisions are primarily the obligations of the contracting Governments each to the other. They do not purport to repeal or modify any law of the United States, and they are not

inconsistent with the continued enforcement of sections 5272 and 5275, Revised Statutes, which constitute a rule of conduct obligatory upon the officers of the United States whose conduct is here questioned.

23 It is, of course, true that a statute inconsistent with a treaty is repealed by implication. It is too clear for argument that there is no such implication in this instance.

I am therefore of opinion that without further interpreting the language of the convention the governmental contention is untenable in the light of the above referred to sections of the Revised Statutes as still authoritatively interpreted by the case of Rauscher.

It is doubtless true that the insertion of the word "punished" in article 3 of the convention would have rendered that instrument clearer, and the argument is not without force that its omission is notable in view of its presence in many other extradition treaties negotiated with other nations at or about the same time. As, however, I regard the general doctrine laid down in the case of Rauscher, as based upon existing statutes of the United States, to be entirely conclusive of this matter, I need not pursue the consideration of the convention of 1889 further than to say that it appears to me very doubtful, in view of the provisions of article 7, that article 3 should be so construed as to permit either of the contracting parties to do so by indirection under that article what neither could do openly under article 7, and that I consider the insertion of the word "punished" in article 2 as more than a recognition of the historical fact that political offences are frequently punished without trial.

I have given this cause consideration proportioned rather to its importance than its apparent difficulty, and conclude that in my opinion, as long as the present Federal statutes on the sub-

24 ject remain in force unrepealed either by Congress or the express language of a treaty, there is no authority of or within these United States having any right or power to seize, arrest, confine, or detain any person extradited in pursuance of treaty provisions and for a specific offence for any other offence, crime, or cause whatsoever (committed or existing before his extradition) except for that specific offence, crime, or cause by reason of which the extradition has been granted; and further, that this doctrine rests not only nor principally upon the civil rights or personal privileges of a fugitive criminal who has been returned in accordance with an increasingly civilized international law, but upon the highest grounds of national honor, imposing upon this Government and upon all persons subject to its rule the obligation to deal with the human being entrusted to them by a friendly foreign power only with respect of the matter by reason of which he was so entrusted.

Let the relator be discharged.

Aug. 14, 1906.

C. M. Hough, *D. J.*

(Endorsed:) U. S. Circuit Court, Southern District of New York. In the matter of Chas. C. Browne. Opinion. U. S. Circuit Court, Southern District New York. Filed Aug. 14, 1906. John A. Shields, clerk.

25 At a stated session of the Circuit Court of the United States for the Southern District of New York, held at the United States court-house and post-office building in the city of New York on the 14th day of August, 1906.

Present: Hon. Charles M. Hough, judge.

In the matter of the Petition of Charles C. Browne for a writ of habeas corpus.

Whereas a writ of habeas corpus has been heretofore issued on the application of Charles C. Browne, directed to Addison Johnson, agent and warden of the State prison of the State of New York, commanding him to bring up the body of Charles C. Browne for the purpose of inquiring into the cause of his detention, and the said prisoner having been brought before me and an examination had, and it appearing on such examination that the said Charles C. Browne is unlawfully imprisoned and restrained of his liberty,

Now, after hearing William M. K. Olcott, esq., on behalf of the prisoner, and Henry L. Stimson and W. Wickham Smith, esqs., opposed, it is therefore finally

Ordered, that the said Charles C. Browne be, and he hereby is, forthwith discharged from the custody of the said Addison Johnson as agent and warden of the State prison of the State of New York.

C. M. Hough, *D. J.*

Approved as to form.

H. L. Stimson, *U. S. Atty.*

26 (Endorsed:) U. S. Circuit Court. In the matter of the petition of Charles C. Browne for a writ of habeas corpus. Order. Black, Olcott, Gruber & Bonynge, attorneys for petitioner, 170 Broadway, New York City. U. S. Circuit Court, Southern District New York. Filed Aug. 14, 1906. John A. Shields, clerk.

27 Circuit Court of the United States for the Southern District of New York.

Addison Johnson, warden of the State prison of the State of New York, at Sing Sing, N. Y.,
vs.
Charles C. Browne, petitioner.

The above-named Addison Johnson, agent and warden of the State prison of the State of New York, at Sing Sing, N. Y., feeling aggrieved by the order of the Circuit Court of the United States for the Southern District of New York, entered herein on the 14th day of August, 1906, discharging the above-named Charles C. Browne, the peti-

tioner, from the custody of said Addison Johnson, as agent and warden of the State prison of the State of New York at Sing Sing, N. Y., hereby applies for the allowance of an appeal to the Supreme Court of the United States.

Dated New York, October 19th, 1906.

HENRY L. STIMSON,
U. S. Attorney for the Southern District of New York.

The foregoing appeal is hereby allowed.

Dated New York, October 19th, 1906.

C. M. HOUGH,
U. S. District Judge, Holding U. S. Circuit Court.

(Endorsed:) Circuit Court of the United States for the Southern District of New York. Addison Johnson, warden of the State prison of the State of New York at Sing Sing, N. Y., vs. Charles C.
28 Browne, petitioner. Petition & allowance of appeal. Henry L. Stimson, U. S. attorney for the Southern District of New York, on behalf of Addison Johnson, warden, &c., No. 50 P. O. building, Borough of Manhattan, N. Y. City. Copy of the within is hereby admitted, N. Y., Oct. 19, 1906, Black, Olcott, Gruber & Bonynge, attys. for petitioner. U. S. Circuit Court, Southern District New York. Filed Oct. 19, 1906. John A. Shields, clerk.

29 Circuit Court of the United States for the Southern District of New York.

ADDISON JOHNSON, WARDEN OF THE STATE prison of the State of New York, at Sing Sing, N. Y.,
vs.
CHARLES C. BROWNE, PETITIONER.

And now comes Addison Johnson, appellant, and assigns as error:

1. That the Circuit Court discharged petitioner herein from the custody of appellant on the ground that his detention was in violation of the treaty of extradition between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland concluded July 12th, 1889.

2. That the said court did not remand the said petitioner to the custody of appellant to execute the sentence of the United States Circuit Court for the Southern District of New York pronounced on said petitioner on the 11th day of March, 1904.

Dated New York, October 19th, 1906.

HENRY L. STIMSON,
U. S. Attorney, for Appellant,
No. 50 P. O. Building, Borough of Manhattan, N. Y. City.

(Endorsed:) Circuit Court of the United States for the Southern District of New York. Addison Johnson, warden of the State prison of the State of New York at Sing Sing, N. Y., vs. Charles C. Browne, petitioner. Assignment of errors. Henry L. Stimson, U. S.

attorney, for appellant, No. 50 P. O. building, N. Y. City. Copy of the within is hereby admitted, N. Y., Oct. 19, 1906. Black, Olcott, Gruber & Bonynge, atty'. for petitioner. U. S. Circuit Court, Southern District New York. Filed Oct. 19, 1906. John A. Shields, clerk.

30 UNITED STATES OF AMERICA, *ss:*

To Charles C. Browne, petitioner:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the city of Washington, on the 16th day of November, 1906, pursuant to an appeal, on the part of Addison Johnson, warden of the State prison of the State of New York at Sing Sing, N. Y., filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York in a certain suit or proceeding entitled "Addison Johnson, warden of the State prison of the State of New York at Sing Sing, N. Y., vs. Charles C. Browne, petitioner," to show cause, if any there be, why the decision of the United States Circuit Court in the said appeal mentioned should not be reversed, modified, or corrected and speedy justice should not be done in that behalf.

Given under my hand at the city of New York, in the Southern District of New York, on the 19th day of October, 1906.

C. M. HOUGH,
U. S. District Judge, Holding U. S. Circuit Court.

HENRY L. STIMSON,
U. S. Attorney, on Behalf of Addison Johnson, Warden of the State Prison of the State of New York at Sing Sing, N. Y., Appellant.

(Endorsed:) United States Supreme Court. Addison Johnson, warden of the State prison of the State of New York at Sing Sing, N. Y., vs. Charles C. Browne, petitioner. Citation. Henry L. Stimson, U. S. attorney, on behalf of Addison Johnson, warden, &c.,
31 No. 50 P. O. building, Borough of Manhattan, N. Y. City. Service of a copy of the within citation is hereby admitted. Dated New York, October 19th, 1906. Black, Olcott, Gruber & Bonynge, attys. for petitioner. U. S. Circuit Court, Southern District New York. Filed Oct. 19, 1906. John A. Shields, clerk.

32 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to thirty-one, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause entitled "Addison Johnson, warden of the State prison of the State of New

York at Sing Sing, N. Y., against Charles C. Browne, petitioner," as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 31st day of October, in the year of our Lord one thousand nine hundred and six and of the independence of the said United States the one hundred and thirty-first.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsed:) United States Supreme Court. Addison Johnson, warden of the State prison of New York at Sing Sing, N. Y., vs. Charles C. Browne, petitioner. Transcript of record from the Circuit Court of the United States for the Southern District of New York.

33 (Indorsement on cover:) File No. 20446. S. New York, C. C. U. S. Term No., 481. Addison Johnson, agent and warden of the State prison of the State of New York at Sing Sing, N. Y., appellant, vs. Charles C. Browne. Filed November 2d, 1906. File No. 20446.

FILE COPY

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

No. 481.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

ADDISON JOHNSON, AGENT AND WARDEN OF SING SING PRISON, APPELLANT,

v.

CHARLES C. BROWNE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

ADDISON JOHNSON, AGENT AND WARDEN of Sing Sing Prison, appellant,
v.
CHARLES C. BROWNE.

No. 481.

MOTION TO ADVANCE.

Comes now the Solicitor-General, and moves to advance the above-entitled cause for hearing during the present term at the earliest date convenient to the court.

This is a habeas corpus proceeding arising out of a criminal case and involves a most important question relating to the law of extradition; one which has never heretofore been past upon by this court.

STATEMENT.

In the spring of 1902 it was disclosed by investigation that extensive frauds had been practised at the port of New York in the importation and entry of Japanese silks. The parties implicated were an importing firm known as A. S. Rosenthal & Co. and an examiner of silks in the appraisers' department at the port of New York, named Charles C.

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Browne, the appellee here. The frauds consisted of the presentation for customs purposes of invoices made out in Japan, wherein the weight of the silks was falsely and fraudulently understated, and the certification by Browne (whose duty it was to examine and report as to the correctness of the invoices by comparing them with the goods themselves sent to the public stores for examination by him) that these false and fraudulent invoices were correct.

In the spring of 1903 the grand jury of the United States Circuit Court for the Southern District of New York filed two indictments against the respondent Browne. In one of these, under section 5440, Revised Statutes, he was jointly indicted with the two importers, A. S. Rosenthal and Martin L. Cohn (composing the firm of A. S. Rosenthal & Co.), for conspiring to defraud the United States. In the other indictment Browne alone was charged under section 5444 of the Revised Statutes with knowingly aiding in attempting to enter Japanese silks upon payment of less than the amount of duty legally due thereon.

In January, 1904, the conspiracy indictment was brought to trial. The defendant Rosenthal had absconded and did not appear and is now a fugitive from justice. The trial proceeded against the other two defendants, and Browne was found guilty and was sentenced to two years at hard labor in Sing Sing Prison.

An appeal was prosecuted on behalf of Browne to the United States Circuit Court of Appeals where his conviction was affirmed. An application was thereupon made to this court for a writ of certiorari, which, on the 15th day of January, 1906, was denied. Four days later, on the 19th of January, 1906, Browne was called in the Circuit Court to submit himself for the execution of the sentence, and failed to respond. A few days later it was discovered he had fled to Canada.

The Government instituted proceedings in Montreal to have Browne extradited under subdv. 4, art. 1, of the extradition treaty between the United States and Canada, which provides for fraud committed by an agent as one of the grounds of extradition. After various hearings the extradition commissioner held Browne for extradition, but on a writ of habeas corpus the Court of Kings Bench decided that the crime of conspiring to defraud, of which he had been convicted, was not fraud within the meaning of the section of the treaty above referred to, and ordered his discharge.

The United States Government immediately caused the rearrest of Browne on a new complaint, charging him with the offenses for which he had been indicted under section 5444 of the Revised Statutes in 1903, and for which offenses he had not been tried in New York. This second proceeding resulted in his being held for extradition by the commissioner, and upon writ of habeas corpus

the Court of Kings Bench decided that a case for extradition had been made out, and ordered his surrender to the United States authorities.

Browne was brought from Montreal by an officer of the United States deputed for that purpose, and when the train on which he was a passenger arrived within the Southern District of New York he was surrendered by the officer who had brought him to the marshal of the United States for the Southern District of New York, the proper custodian for his reception. The said marshal having in his hands the unexecuted process of the United States Circuit Court for the Southern District of New York, by which Browne had been ordered to serve a term of two years in Sing Sing Prison, proceeded to deliver him into the custody of the warden of Sing Sing Prison. Browne thereupon sued out a writ of habeas corpus in the United States Circuit Court for the Southern District of New York, claiming that his imprisonment for a crime of which he had been convicted before his flight, and a different crime from that upon which his extradition had been ordered, was in violation of the third article of the extradition treaty between the United States and Great Britain. Upon the return day named in the writ the warden of Sing Sing prison made return to the writ, setting forth that he held Browne under an order of the United States Circuit Court for the Southern District of New York, sentencing him to serve a term of two years at hard labor at Sing Sing

prison. The facts in the case were in no wise disputed. After hearing argument, Judge Hough, United States district judge sitting in the Circuit Court, decided that Browne's imprisonment was illegal and in violation of the terms of the extradition treaty and directed his release. An order to that effect was entered, and from that order the present appeal is prosecuted by the United States.

Treaty provisions to be considered.

The following provisions of the extradition convention between the United States and Great Britain, concluded July 12, 1889, proclaimed March 25, 1890 (26 U. S. Stat. at Large, 1508), will require the construction of the court:

> ART. 2. No person surrendered by either of the high contracting parties to the other *shall be triable or be tried* OR BE PUNISHED for any political crime or offense, or for any act connected therewith committed previously to his extradition.
>
> ART. 3. No person surrendered by or to either of the high contracting parties shall *be triable or be tried* for any crime or offense committed prior to his extradition other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he has been surrendered.
>
> ART. 7. The provisions * * * of this convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence shall not have been executed.

Precise question involved.

The question to be determined by the court is whether there is anything in the treaty provisions above cited, or in the decisions of this court, which permits or requires that a person duly convicted in the courts of the United States of a nonpolitical offense, and sentenced to imprisonment therefor before his flight, shall be allowed to go at large within the United States and within the district in which he was sentenced, because he has been extradited from Great Britain or Canada for another offense for which he has not yet been tried.

Or, to put it in another form, does the fact that a person has been extradited from Great Britain or Canada for an offense for which he has not yet been tried, estop a court of the United States from enforcing its judgment of imprisonment against such person for an offense of which he was duly convicted, and for which he was sentenced to imprisonment before his flight from the United States?

Reasons for advancement.

It will be seen at once that the question involved, as above stated, is of the highest importance. It has never been past upon in this court, or, so far as investigation has disclosed, in any court of the United States, except in a case in the Circuit Court of the United States for the Western District of Pennsylvania, decided not only before the adoption of the present extradition convention, but before the decision of this court in the case of *U. S.* v. *Rauscher* (119 U. S., 407). The question is one lia-

ble to occur at any time. The proximity of Canada and the facilities for crossing the boundary are such that persons convicted of crimes in the United States who have been out on bail pending appeal are likely to take refuge there at any time, *and as matter of fact, instances of this character are numerous and frequent.* The decision of this court in the *Rauscher* case rendered twenty years ago has been the subject of widely different interpretations in the State and Federal courts, and it is highly important that an authoritative pronouncement of this court shall be obtained as to the extent to which the doctrines laid down therein shall be carried, in view of special provisions since incorporated in treaties between the United States and various foreign countries.

Instances are liable to occur at any time of the discovery, after persons have been extradited, of the fact that they have been convicted and sentenced for other offenses prior to their extradition or to their flight. An instance is liable to occur at any time of a person who has been extradited for a minor crime being found, after extradition, to be the same person who prior to his extradition and flight had been convicted of a far graver crime. If the opinion of the Circuit Court in this case is to stand as the law no court of the United States or of a State can enforce its sentence against any person who may have been extradited for some other offense without giving him an opportunity to again take refuge in the foreign country from which he was extradited.

In the case at bar the respondent, having since his extradition given bail to appear for trial on the charge for which he was extradited, is now at large in the Southern District of New York, notwithstanding he has never served his sentence for conspiring to defraud the United States. Such a spectacle is unseemly and tends to bring the administration of the criminal laws into disrepute, and it would seem no argument is required on the proposition that a decision of this court should be obtained at the earliest practicable moment in order that, if the decision of the court below should be sustained here, it may be open to the executive branch of the Government to take such steps in the direction of amending extradition treaties as may be necessary to prevent the future recurrence of such anomalous conditions.

The trial of the respondent for conspiracy in January, 1904, consumed nearly a month and involved the Government in great expense. It is respectfully suggested that the Government is entitled to know whether all this time and expense is to go for nothing; and the court which rendered the judgment is paralyzed from enforcing it, before setting in motion further proceedings against the petitioner upon the other pending charge.

HENRY M. HOYT,
Solicitor-General.
W. WICKHAM SMITH,
Special Assistant to the Attorney-General.

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JAMES H. McKENNEY,
CLERK.

No. 481.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

ADDISON JOHNSON, AGENT AND WARDEN OF SING SING PRISON, APPELLANT,

v.

CHARLES C. BROWNE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

ADDISON JOHNSON, AGENT AND WARDEN of Sing Sing Prison, appellant,
v.
CHARLES C. BROWNE.

No. 481.

BRIEF FOR APPELLANT.

This is a habeas corpus proceeding arising out of a criminal case and involves a most important question relating to the law of extradition—one which has never heretofore been passed upon by this court.

STATEMENT.

In the spring of 1902 it was disclosed by investigation that extensive frauds had been practiced at the port of New York in the importation and entry of Japanese silks. The parties implicated were an importing firm known as A. S. Rosenthal & Co. and an examiner of silks in the appraiser's department at the port of New York named Charles C.

Browne, the appellee here. The frauds consisted of the presentation for customs purposes of invoices made out in Japan, wherein the weight of the silks was falsely and fraudulently understated, and the certification by Browne (whose duty it was to examine and report as to the correctness of the invoices by comparing them with the goods themselves sent to the public stores for examination by him) that these false and fraudulent invoices were correct.

In the spring of 1903 the grand jury of the United States Circuit Court for the Southern District of New York filed two indictments against the respondent Browne. In one of these, under section 5440, Revised Statutes, he was jointly indicted with the two importers, A. S. Rosenthal and Martin L. Cohn (composing the firm of A. S. Rosenthal & Co.), for conspiring to defraud the United States. In the other indictment Browne alone was charged, under section 5444 of the Revised Statutes, with knowingly aiding in attempting to enter Japanese silks upon payment of less than the amount of duty legally due thereon.

In January, 1904, the conspiracy indictment was brought to trial. The defendant Rosenthal had absconded and did not appear, and is now a fugitive from justice. The trial proceeded against the other two defendants, and Browne was found guilty and was sentenced to two years at hard labor in Sing Sing Prison.

An appeal was prosecuted on behalf of Browne

to the United States Circuit Court of Appeals where his conviction was affirmed. An application was thereupon made to this court for a writ of certiorari, which, on the 15th day of January, 1906, was denied. Four days later, on the 19th of January, 1906, Browne was called in the Circuit Court to submit himself for the execution of the sentence, and failed to respond. A few days later it was discovered he had fled to Canada.

The Government instituted proceedings in Montreal to have Browne extradited under subdv. 4, art. 1, of the extradition treaty between the United States and Canada, which provides for fraud committed by an agent as one of the grounds of extradition. After various hearings the extradition commissioner held Browne for extradition, but on a writ of habeas corpus the Court of Kings Bench decided that the crime of conspiring to defraud, of which he had been convicted, was not fraud within the meaning of the section of the treaty above referred to, and ordered his discharge.

The United States Government immediately caused the rearrest of Browne on a new complaint, charging him with the offenses for which he had been indicted under section 5444 of the Revised Statutes in 1903, and for which offenses he had not been tried in New York. This second proceeding resulted in his being held for extradition by the commissioner, and upon writ of habeas corpus the Court of Kings Bench decided that a case for extradition had been made out,

and ordered his surrender to the United States authorities.

Browne was brought from Montreal by an officer of the United States deputed for that purpose, and when the train on which he was a passenger arrived within the Southern District of New York he was surrendered by the officer who had brought him to the marshal of the United States for the Southern District of New York, the proper custodian for his reception. The said marshal having in his hands the unexecuted process of the United States Circuit Court for the Southern District of New York, by which Browne had been ordered to serve a term of two years in Sing Sing Prison, proceeded to deliver him into the custody of the warden of Sing Sing Prison. Browne thereupon sued out a writ of habeas corpus in the United States Circuit Court for the Southern District of New York, claiming that his imprisonment for a crime of which he had been convicted before his flight, and a different crime from that upon which his extradition had been ordered, was in violation of the third and seventh articles of the extradition treaty between the United States and Great Britain. Upon the return day named in the writ the warden of Sing Sing Prison made return to the writ, setting forth that he held Browne under an order of the United States Circuit Court for the Southern District of New York, sentencing him to serve a term of two years at hard labor at Sing Sing Prison. The facts in the case were in no wise

disputed. After hearing argument, Judge Hough, United States District Judge sitting in the Circuit Court, decided that Browne's imprisonment was illegal and in violation of the terms of the extradition treaty and directed his release. An order to that effect was entered, and from that order the present appeal is prosecuted by the United States.

TREATY PROVISIONS TO BE CONSIDERED.

The following provisions of the extradition convention between the United States and Great Britain, concluded July 12, 1889, proclaimed March 25, 1890 (26 Stat., 1508), will require the construction of the court:

> ART. 2 (par. 2). No person surrendered by either of the High Contracting Parties to the other *shall be triable or tried*, OR BE PUNISHED for any political crime or offense, or for any act connected therewith, committed previously to his extradition.
>
> ART. 3. No person surrendered by or to either of the High Contracting Parties shall *be triable or be tried* for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.
>
> ART. 7. The provisions * * * of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

PRECISE QUESTION INVOLVED.

The question to be determined by the court is whether there is anything in the treaty provisions above cited, or in the decisions of this court, which permits or requires that a person duly convicted in the courts of the United States of a nonpolitical offense, and sentenced to imprisonment therefor before his flight, shall be allowed to go at large within the United States and within the district in which he was sentenced because he has been extradited from Great Britain or Canada for another offense for which he has not yet been tried, and whether a court of the United States is prevented from enforcing its judgment of imprisonment against such person for an offense of which he was duly convicted.

The learned judge in the court below based his action discharging the respondent on a ruling that the action of the Government in this case was in conflict with the decision of this court in the case of *United States* vs. *Rauscher* (119 U. S., 407).

The Government submits with confidence the following propositions upon which it relies, and upon which it predicates its contention that the action of the lower court in discharging the respondent was erroneous and should be reversed:

1. That there is nothing in either Article III or Article VII of the Blaine-Pauncefote Treaty of July 12, 1889, which protects the respondent from imprisonment under a sentence imposed before his flight.

2. That the language of Article III of the Treaty of 1889, considered in connection with that of Article II of the same treaty, repels any inference that it was the true intent and meaning of Article III to forbid the punishment of any person extradited under the terms of the treaty for an offense of which he had been convicted and upon which he had been sentenced before his flight.

3. That the language of Article III of the treaty, when compared with that of provisions in other treaties of the United States adopted both prior and subsequent to the adoption of the treaty in question, plainly shows that the construction contended for by the respondent is untenable.

4. That the fact that an application had been made by the United States to the Canadian government for the extradition of respondent on a charge upon which he had been convicted and sentenced, and that said application had been refused, does not in any way destroy the right of the Circuit Court of the United States to enforce the execution of its sentence after the extradition of respondent on another charge.

5. That there is nothing in the decision of this court, in the case of *United States* v. *Rauscher* (119 U. S., 407) which prevents the imprisonment of respondent under the sentence imposed upon him before his flight.

ARGUMENT.

I.

THERE IS NOTHING IN EITHER ARTICLE III OR ARTICLE VII OF THE BLAINE-PAUNCEFOTE TREATY OF JULY 12, 1889, WHICH PROTECTS THE RESPONDENT FROM IMPRISONMENT UNDER A SENTENCE IMPOSED BEFORE HIS FLIGHT.

So far as Article VII of the treaty is concerned, it certainly requires no extended discussion. It must be read and considered in the light of the second recital of the preamble, which is as follows:

> And whereas it is now desired by the High Contracting Parties that the provisions of the said article [Article 10 of the Ashburton Treaty of 1882] should embrace certain crimes not therein specified, *and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention.*

It is entirely clear that the sole purpose of paragraph 1 of Article VII was to prevent any claim being interposed on behalf of a fugitive *convict* that the provisions of the treaties of 1842 and 1889 applied only to untried criminals, and not to those who had been tried and convicted.

Coming now to Article III, we find it to provide that—

> No person surrendered by or to either of the High Contracting Parties *shall be triable or be tried* for any crime or offense, committed prior to his extradition, other than

> the offense for which he was surrendered until he shall have had an opportunity of returning to the country from which he was surrendered.

This language is plain, unambiguous, and unequivocal. It leaves no room for construction. Neither in a contract nor in a statute could these words be stretched so as to include punishment. The word "tried" has a plain meaning, everywhere understood, and as to which there can be no mistake or confusion. It certainly does not imply or include punishment. Until a party has been tried it can not be determined whether he is to suffer any punishment. He may be acquitted, or after conviction sentence may be suspended, or he may be immediately pardoned, in none of which cases would he suffer any punishment. The object of inserting the word "triable" is obviously to protect the person extradited from being arrested and kept in custody or held in bail awaiting trial. It was obviously intended to give the party extradited a right to raise the question of the illegality of his arrest without having to wait until the prosecuting officer got ready to try him, and compel him to put in his plea for the first time at the beginning of the trial.

The language of this provision, it is insisted, leaves no room for construction. It is sometimes suggested that statutes may require construction even where their language is plain and unequivocal, to prevent such an application of the statute as,

while it may be consistent with the plain meaning of the words, is plainly opposed to the spirit and intent of the legislation. This doctrine, sometimes applied by the judicial branch of the Government, is based upon the well-known fact that statutes are often hastily prepared, frequently amended in the hurry of legislative proceedings, considered by the Executive when a great mass of other bills awaiting action prevents careful deliberation, whereby a statute may sometimes say precisely the opposite of what it means. But this doctrine can have no application to solemn treaties, because the grounds upon which it is predicated have no existence in the case of treaties. Treaties are prepared with care, formality, and the utmost deliberation. They are the product of extended and careful negotiations. Their language is drafted, amended, and polished to the point of utmost nicety of expression by trained diplomats, skilled in the utmost refinements of verbal discrimination. This particular treaty was negotiated by the late Secretary of State, Mr. James G. Blaine, and the former British Ambassador, Sir Julian Pauncefote. It would be a strange assumption that two such men as these did not say exactly what they meant to say—no more and no less.

Not only has the language of such a treaty to receive the approval of trained diplomats, after careful deliberation, but in this country it has to run the gauntlet of deliberate consideration and discussion in the Senate of the United States.

It is further to be noted that on the 13th of January, 1902 (see compilation of treaties in force 1904, p. 377), thirteen years after the adoption of the treaty now under consideration, it was amended by a supplementary treaty prepared by the late Secretary Hay (a man also of high literary distinction) and Sir Julian Pauncefote. If any errors had been discovered in the text of the treaty, they might then have been corrected; and this court is now asked to do what the framers of the supplementary treaty found no occasion for doing.

Several of our extradition treaties provide that no person shall be tried for any offense other than that for which he was extradited, unless the offense for which it is proposed to try him be one denounced in the extradition treaty. It is respectfully submitted that the court would have as much right to interpolate this provision into Article III as it has to interpolate there the word "punished."

The necessity and propriety of adhering to the plain language of treaties has been fully recognized by this court. In the case of *The Amiable Isabella*, (6 Wheaton, 1, 71), this court said (per Story, J.):

> In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another Department of the Government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on

> our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties, by just rules of interpretation, applied to the subject-matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

Again in the case of *Society, &c.*, v. *New Haven* (8 Wheaton, 464, 490), this court said (per Washington, J.):

> The terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction. Now, the parties to this treaty have agreed that there shall be no future confiscations, in any case, for the cause stated. How can this court say, that this is a case where, for the cause stated, or for some other, confiscation may lawfully be decreed?

Again in the case of *Tucker* v. *Alexandroff*, (183 U. S., 424, 436), this court said (per Brown, J.):

> But whatever view might be taken of the question of delivering over foreign seamen in the absence of a treaty, we are of opinion that the treaty with Russia, having con tained a convention upon this subject, that convention must alone be looked to in determining the rights of the Russian authorities to the reclamation of the relator. Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge those powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject-matter is a negation of all other analogous powers with respect to the same subject-matter. (*Ex parte McCardle*, 7 Wall., 506; Endlich on Stats., secs. 397, 400.) As observed by Lord Denham in *Aspdin* v. *Austin* (5 Ad. & El. (N. S.), 671, 684), "where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." The rule is curtly stated

in the familiar legal maxim, *expressio unius est exclusio alterius*.

II.

THE LANGUAGE OF ARTICLE III OF THE TREATY OF 1889, CONSIDERED IN CONNECTION WITH THAT OF ARTICLE II OF THE SAME TREATY, REPELS ANY INFERENCE THAT IT WAS THE TRUE INTENT AND MEANING OF ARTICLE III TO FORBID THE PUNISHMENT OF ANY PERSON EXTRADITED UNDER THE TERMS OF THE TREATY FOR AN OFFENSE OF WHICH HE HAD BEEN CONVICTED AND UPON WHICH HE HAD BEEN SENTENCED BEFORE HIS FLIGHT.

Article II of the treaty provides as follows (par. 2):

> No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, *or be punished* for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

It will be observed that in this article there is added to the words "triable or tried" found in the third article the words "or be punished." *If these words were found in Article III this case would never have arisen.* The contention on the other side is that, although the framers of this treaty inserted these words in the article referring to political offenses and omitted them from the article providing for other than political offenses, the court is to read them into the third article the same as though

they had been expressly inserted. Upon what theory of statutory or treaty construction this can be done we are at a loss to conceive. The use of these words plainly indicated that the punishment of those charged with offenses after their conviction was in the minds of the parties to this agreement, and that they deliberately elected to forbid it as to political offenses and to refrain from forbidding it as to other offenses.

Further light is thrown on this matter by the first paragraph of Article II of the treaty, which is as follows:

> A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded be one of a political character, *or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.*

It will be seen that the framers of the treaty not only forbid the trial or punishment of a person extradited under the treaty for any political crime or offense or for any act connected therewith, committed previously to his extradition, but that they went so far as to provide that if the offense for which his surrender was demanded was a nonpolitical offense, but that he could prove that the real object of demanding his extradition was to punish him for an offense of a political character, he was not to be surrendered. Punishment, as distinguished from trial, was plainly in the minds

of the framers of this treaty, as evidenced by every part of Article II. Yet no reference to it is made in Article III. If Great Britain were to demand from the United States the extradition of a person on a charge of forgery, burglary, or rape, could such a party demand his discharge from the United States court on a writ of *habeas corpus* or otherwise, by offering to prove or offering proof that the real intent of the British Government was to punish him for a *nonpolitical* offense committed prior to the request for his extradition? It is inconceivable that any other than a negative answer can be made to this question; yet we can not see why a court has not as much right to read this provision into Article III as to read in the word "punished," as it is asked to do by counsel for the respondent.

That the intention of the parties to a treaty must be ascertained by an examination of the entire instrument was held by this court, speaking by Mr. Justice Harlan, in *United States* v. *Texas* (162 U. S., 1).

The same principle has been repeatedly applied by this court to statutes (*Silver* v. *Ladd*, 7 Wallace, 219, 227; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 1, 22; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S., 613, 635).

In *Pennington* v. *Coxe* (2 Cranch, 33, 59), Chief Justice Marshall used the following language:

> Where the provisions of two acts are so unlike each other, that the comparison

exhibits only a contrast, instead of saying that their opposing regulations were designed to be similar, it would seem much more reasonable to say, that the one act exhibits a legislative mind materially variant in the particulars where the difference exists, from what is exhibited by the other.

III.

THE LANGUAGE OF ARTICLE III OF THE TREATY WHEN COMPARED WITH THAT OF PROVISIONS IN OTHER TREATIES OF THE UNITED STATES ADOPTED BOTH PRIOR AND SUBSEQUENT TO THAT OF THE TREATY IN QUESTION PLAINLY SHOWS THAT THE CONSTRUCTION CONTENDED FOR BY THE RESPONDENT IS UNTENABLE.

Under this point attention is respectfully called to the following extradition treaties (each of which is described by its date, page of the Compilation of Treaties in Force, 1904, in which the pertinent provisions will be found), and the number of the article of the treaty, to which attention is invited:

Treaty with Japan, April 29, 1886, article 4, page 472.

Treaty with Netherlands, June 2, 1887, article 3, page 588.

Treaty with Colombia, May 7, 1888, article 5, page 213.

Treaty with Sweden and Norway, January 14, 1893, article 8, page 766.

Treaty with Brazil, May 14, 1897, article 4, subdivisions 1 and 2, page 119.

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Treaty with Mexico, February 22, 1899, article 12, page 548.

Treaty with Peru, November 28, 1899, article 9, page 633.

Treaty with Chili, April 17, 1900, article 7, page 130.

Treaty with Bolivia, April 21, 1900, article 8, page 101.

Treaty with Switzerland, May 14, 1900, article 9, page 776.

Treaty with Servia, October 25, 1901, article 6, subdivision 2, page 701.

Treaty with Belgium, October 26, 1901, article 3, page 83.

Treaty with Denmark, January 6, 1902, article 8, page 245.

Treaty with Guatemala, February 27, 1903, article 3, page 410.

The Compilation of 1904 is so convenient for reference that it is deemed unnecessary to print these various treaty provisions here. As will be observed, three of them antedate the Blaine-Pauncefote Treaty under consideration; the other eleven are subsequent. The provision in the treaty with Japan (Article IV, treaty of April 29, 1886,) is as follows:

> If it be made to appear that extradition is sought with a view to try or punish the person demanded for an offense of a political character, surrender shall not take place; nor shall any person surrendered be tried or punished for any political offense committed previously to his extra-

> dition, or for any offense other than that in respect of which the extradition is granted.

The provision of the treaty with Colombia, May 7, 1888 (Art. V), is in almost identical language.

The provision of the treaty with the Netherlands, June 2, 1887 (Art. IV), is as follows:

> No person shall be tried or punished, after surrender, for any crime or offense other than that for which he was surrendered, if committed previous to his surrender, unless such crime or offense be one of those enumerated in Article II hereof.

In three treaties adopted prior to the one now under consideration, distinct provision has been made in plain and unmistakable language that a person extradited should be neither tried nor punished for an offense other than that for which he was extradited (except that in the case of the treaty with the Netherlands he might be either tried or punished for an offense which was itself made extraditable by the terms of the treaty). In eleven subsequent treaties, extending from that of Sweden and Norway, January 14, 1893, to that of Guatemala, February 27, 1903, similar plain and unmistakable language is used. Our diplomats, as well as those of the various other countries, evidently knew how to use language which would unmistakably forbid the punishment of an extradited criminal for any offense other than that for which he was extradited.

Treaties like statutes are to be considered *in pari materia* when they relate to the same subject, and all these treaties are extradition treaties. Upon what theory can this court be asked to read into Article III of this treaty a word of the greatest importance in changing its sense, which the parties to the treaty have not inserted or in any way implied, when in fourteen other treaties coving a period of seventeen years, and beginning three years before the treaty in question, the treaty framers have found it necessary to expressly use the word which the court is asked to read into a provision of this treaty from which it is expressly omitted?

In the case of *in re Joseph Stupp* (11 Blatchford, 124) Judge Blatchford examined prior and subsequent extradition treaties for the purpose of determining the true construction of the extradition treaty between the United States and Prussia.

IV.

THE FACT THAT AN APPLICATION HAD BEEN MADE BY THE UNITED STATES TO THE CANADIAN GOVERNMENT FOR THE EXTRADITION OF RESPONDENT ON A CHARGE UPON WHICH HE HAD BEEN CONVICTED AND SENTENCED, AND THAT SAID APPLICATION HAD BEEN REFUSED, DOES NOT IN ANY WAY DESTROY THE RIGHT OF THE CIRCUIT COURT OF THE UNITED STATES TO ENFORCE THE EXECUTION OF ITS SENTENCE AFTER THE EXTRADITION OF RESPONDENT ON ANOTHER CHARGE.

This point is referred to, not because of any

special importance attached to it by the Government, but because at previous stages of this controversy great stress has been laid upon it by the counsel for the respondent. Under the terms of this treaty the United States either has or has not the right to punish a person extradited, for a crime or an offense on which he was convicted and upon which he was sentenced before his flight. If it has not that right, of course, the order discharging the respondent was proper and must be affirmed; but if the United States has the right in question, it has always had it and it could not lose it, because, in order to save time and expense, it asked the Canadian government to extradite the respondent for the very offense and conviction under which it now seeks to punish him.

This court can certainly not be asked to hold a proposition so extraordinary as that the Government might have punished Browne for the offense upon which he was convicted and sentenced before his flight to Canada, notwithstanding he was extradited for another and different offense, if it had not applied to the Canadian government for Browne's extradition in the first instance on the charge for which it is now sought to punish him; but that because it made that application and met with a refusal it has lost the right which it would otherwise have had. The rights and obligations of the United States are measured by and defined in the treaty and not by the attitude of the other party to the treaty in dealing with an application

for extradition. The fact that the United States made an application for Browne's extradition on the conspiracy charge is absolutely immaterial to this present controversy. They neither gained nor lost any rights which they had by making that application.

Moreover, it is most respectfully insisted that as to any question of good faith, as distinguished from a question of law, the whole matter is one to be dealt with by the Executive Department of the Government, and one with which the judicial branch is in nowise concerned.

V.

THERE IS NOTHING IN THE DECISION OF THIS COURT IN THE CASE OF UNITED STATES v. RAUSCHER (119 U. S., 407) WHICH PREVENTS THE IMPRISONMENT OF RESPONDENT UNDER THE SENTENCE IMPOSED UPON HIM BEFORE HIS FLIGHT.

The importance of this point lies in the fact that the decision of the court below discharging the respondent from the custody of the warden of Sing Sing Prison was based largely, if not wholly, upon a ruling that the action of the Government was in conflict with the decision of this court in the *Rauscher* case. This seems not only to justify, but require, a careful review of the *Rauscher* decision and a consideration of its bearing on the case at bar.

William Rauscher had been extradited from some place under the dominion of Great Britain on

a charge of having *murdered* a seaman named Jansen on the high seas on board the ship *J. F. Chapman*, of which Rauscher was second mate. He was brought to trial in the Southern District of New York for the crime of *inflicting cruel and unusual punishment* upon Jansen at the same time and place, the offenses of murder and inflicting cruel and unusual punishment on the high seas being provided for, respectively, in sections 5339 and 5347 of the Revised Statutes of the United States. He was convicted of the lesser crime, and on a motion in arrest of judgment raised the question that he could not be tried for any offense other than that for which he had been extradited. The point thus raised was brought to this court by a certificate of division of opinion between the judges of the United States Circuit Court for the Southern District of New York. The crime had been committed in 1884, at which time the only applicable extradition agreement between the United States and Great Britain was the tenth section of the Ashburton Treaty of 1842. The decision of this court was announced on the 6th of December, 1886, and sustained Rauscher's contention as to the true meaning and effect of the provision of the Ashburton Treaty. The opinion of the court was announced by Mr. Justice Miller; Mr. Justice Gray concurred in the decision on one ground, but expressed no opinion as to other points involved in the decision, and Chief Justice Waite dissented.

The opinion of the court quoted from various

authorities to show that the better and prevailing opinion among publicists and writers on international law was that a person could be tried after extradition only for the offense for which he had been extradited. It also reviewed the judicial decisions made in this country which were found to be conflicting. It predicated its decision that Rauscher could not be legally tried for any offense other than that for which he had been extradited, on the three following grounds:

First. That the enumeration in section 10 of the Ashburton Treaty of certain offenses for which parties could by one of the contracting parties be delivered up to justice in the courts of the other contracting party, forbade the inference that the party might be tried for any other offense than that for which he had been extradited, in accordance with the legal maxim *expressio unius est exclusio alterius.*

Second. That the requirement in the treaty that evidence must be offered to the surrendering country making out a *prima facie* case of the commission of the crime for which extradition was demanded, was inconsistent with the claim that the party could, after extradition, be tried for any other offense.

Third. That sections 5272 and 5275 amounted to a Congressional construction of the purpose and meaning of extradition treaties, such as the one under consideration, and whether it were or not it was conclusive upon the judiciary of the right

conferred upon persons brought from a foreign country into this under such proceedings.

The two sections of the Revised Statutes referred to in the opinion are as follows:

> SEC. 5272. It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape.
>
> SEC. 5275. Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against

> lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.

The fact should not be lost sight of that before the rendition of this decision the Government of the United States, through its State Department, had consistently and stoutly resisted the claim of the British Government that a person extradited for one offense could not be tried for another. This difference of opinion is alluded to in the *Rauscher* decision, and is set forth at length in Moore on Extradition, pp. 196–219.

It should also be noted that the *Rauscher* case involved no question of *punishing* an extradited person for an offense (other than the one for which he was extradited) upon a conviction and sentence before his flight. Rauscher had not been punished under any previous conviction, but had been tried for a different offense from that on which he was surrendered.

We are now brought to a consideration of how far the decision in the *Rauscher* case is applicable to the question arising in the case at bar.

In the *Rauscher* case this court was dealing with a provision of a treaty which was entirely silent upon the question of the right of the demanding country to try the accused for any offense other than that which had formed the subject of the proceedings in the surrendering country. In this case we are dealing with a treaty which is not silent on this subject, which was made three years after this court's decision in the *Rauscher* case, and it is certainly not an unreasonable contention that the terms of the new treaty were prepared in the light of, and with a view to, the *Rauscher* decision, and to express the intentions of the contracting parties as to the subject which had been treated of in that decision. Treaties and statutes are constantly being adopted or enacted with a view to meeting conditions created by prior decisions of the courts. Sometimes they are made to accord with the decisions of the courts as to prior treaties or statutes, and sometimes the decisions that courts have been constrained to make, as to the construction of treaties or statutes, are not such as embody the wishes of legislators or nations, and new treaties or statutes are made to express an intention contrary to that which the court has been bound to assume as to prior acts.

The proposition for which we are contending is that in 1889 the parties to this contract or treaty (Great Britain and the United States) covered the point which had formed the general subject-

matter of the *Rauscher* decision, and expressed their meaning and intention about it in plain, unequivocal, and unambiguous language, and that, so far as that language is inconsistent with the view laid down as to the Ashburton Treaty in the *Rauscher* decision, *the language of the treaty, and not the decision of the court as to the construction of a prior treaty, is to govern.* Any parties, whether individuals, corporations, or sovereign nations, have a right to make such contracts as they please, and when these come before the courts for judicial construction, the construction given by the court to a prior contract between the parties is not to be applied to the new contract, if such action will contravene the plain language of the parties.

As has been already pointed out, the first ground upon which this court predicated its construction of the Ashburton Treaty was that the enumeration of certain offenses forbids the inference that parties might be tried or convicted for any others for extradition. We invoke this same principle, as applied to the new treaty, and we say that when Article III of that treaty forbids the trial of a party for an offense different from that for which he was extradited, and is silent on the subject of whether he may be punished for it, to hold that punishment was forbidden equally with trial, would be a violation of the maxim *expressio unius est exclusio alterius*, and we insist that this is especially so when another section of the same treaty forbids both trial and punishment as to another class of offenses.

As to the second ground upon which the decision in the *Rauscher* case was based, that the provisions of a treaty calling for the submission of evidence to the surrendering country, such as will make out a *prima facie* case of guilt, are inconsistent with the theory that the party may, after extradition, be tried in the demanding country for another and different offense, we admit that such an inference might be made as to the present treaty were it not for the express language used in Article III. We insist that this language forbids the inference that might otherwise be made. The language used by contracting parties as to one part of the subject-matter of a contract may, in the absence of any other light on the subject, give rise to an inference as to what they meant with reference to another part of the subject-matter of the contract. But where their meaning and intent as to that other part has been plainly expressed by them, and is inconsistent with the inference that might otherwise be drawn, it is very clear that their plain language must govern.

The third ground on which this court predicated its opinion in the *Rauscher* case was the language of sections 5272 and 5275 of the Revised Statutes. These statutes, incorporated in the revision in 1874, had been enacted originally, section 5273 in August, 1848, and section 5275 in March, 1869. The principle is entirely well settled that where a later statute is inconsistent with the terms of earlier statutes, either in express terms or by necessary

implication, the earlier statutes are *pro tanto* expressly or impliedly repealed, and, of course, within the application of this doctrine a later treaty has at least as great force as a later statute. So that if the terms of treaties adopted after the *Rauscher* decision are inconsistent with the sections of the Revised Statutes, referred to in that decision, they undoubtedly supersede them. No one, for example, would deny that they were *pro tanto* expressly repealed by Articles XII and XIII of the treaty with Mexico of February 22, 1899, already referred to, because those articles provide for the trial of a party for an offense not mentioned in the treaty, with the consent of the surrendering Government, and for the trial of such party for an offense other than that for which he was extradited, if it be one of those named in the treaty, without such consent. And we respectfully insist that in the case of this extradition treaty of 1889 with Great Britain, the intent of the parties, as expressed by the plain language of Articles II and III, amounts to an implied repeal of the sections of the Revised Statutes in question, so far as the same are inconsistent with that plain language.

In short, the position of the Government may be summarized thus: The Ashburton Treaty was entirely silent on the subject of the trial of a person extradited for any other offense than that for which he was surrendered. This left the question whether such action might be taken by either of

the high contracting parties an open question, and it became a question of dispute, the British Government insisting upon one view, and the American Government on another. This court, called upon to construe the meaning of the treaty, held it to mean what the British Government contended, and based its ruling on certain grounds stated and elaborated in the decision. Three years after the decision, the high contracting parties came together and entered into a new treaty. In that new treaty they did not remain silent on the disputed question which had arisen under the old treaty, but they dealt with the question and expressed their intention with regard to it in plain terms. Those terms are free from ambiguity and obscurity, and neither require nor justify judicial construction.

So far as this court had decided what the practice should be as to the trial of persons for crimes other than those for which they have been extradited, the new agreement of the parties carried out the principle laid down by the court. But this court had never decided that a party extradited for one crime might not be punished for another of which he had been convicted before his flight, and the high contracting parties not only did not expressly agree to forbid action of this character, but the language they used most plainly negatives the supposition that they intended to forbid it. And it can not be held that they intended to forbid it, and in effect did forbid it, without disregarding the sound principle of statutory con-

struction on which the very decision of this court which is now invoked by respondent was made chiefly to rest.

Not only would the approval by this court of the contention here made by the respondent, we respectfully contend, violate rules of law and principles of statutory construction, but it would most certainly be inconsistent with sound doctrines of enlightened public policy. We are dealing here, not with a person merely *accused* of crime and clothed by the law with a presumption of innocence, but with a *convicted criminal.* Both the court which tried him, and the appellate court in which his conviction was carefully reviewed, have said that there was no doubt of his guilt. (*U. S.* v. *Browne*, 126 Fed. Rep., 766; *Browne* v. *U. S.*, 145 Fed. Rep., 1.) This court refused on application to grant a writ of certiorari for a review of the case. (*Browne* v. *U. S.*, 200 U. S., 618.) No presumptions are to be indulged in favor of such a criminal. No court will be astute to find doubts in his favor nor seek a construction of statutes or treaties which will enable him to escape the just punishment of his crime. The escape of criminals from merited punishment on barren technicalities or refined subtleties of statutory construction is a crying evil of our criminal jurisprudence. It is not in the interest of either of the great nations which are parties to this compact that their convicted criminals should go

unwhipped of justice. Every leaning of the judicial mind should be toward the punishment and not the liberation of persons who, after fair and careful trial, have been convicted of grave crimes. (*Grin* v. *Shine*, 187 U. S., 181.)

Moreover, every principle of enlightened public policy militates against a construction of a treaty which will paralyze the arm of our own courts and prevent them from enforcing their judicial decrees. The spectacle of a criminal like this respondent going at large on bail, awaiting trial for an offense for which he has been extradited, while the sentence imposed upon him by our courts after trial and conviction of another offense remains unexecuted, is far from edifying. It is not one calculated to deter others from the commission of crime. It is now nearly five years since this respondent was indicted. Every technical subterfuge that could be raised to defer his trial, prevent his conviction, and enable him to escape his punishment has been availed of, and now having fled the country, after his appeals had been exhausted, and having been, after his return, put in prison to serve his sentence, he is asking to have a treaty held to mean what it certainly does not say, so that the sentence imposed upon him may never be executed. We respectfully submit that his claim should never be allowed while the treaty which he invokes admits of any other construction.

The consequences of a decision in favor of the respondent in this case will be far-reaching. In-

stances frequently occur where persons arrested and prosecuted for one offense are discovered, after their arrest, to be the same persons who had been previously convicted of grave crimes and had disappeared. If the treaty between Great Britain and the United States is to receive the construction contended for by respondent, a man surrendered by either country to the other on a charge of larceny or fraud who is discovered after his extradition to have been previously convicted of murder or rape and sentenced to capital punishment or imprisonment for life, will be in a position to demand that he shall have a reasonable time to go back to the country by which he was surrendered before he can be punished for the crime of which he was thus convicted. Surely every consideration of public policy forbids giving to a treaty a construction which may produce such a result when there is any construction which may properly be given which will prevent it.

It is submitted that the order discharging the respondent should be reversed and the circuit court directed to remand him to the custody of the appellant to serve out his sentence.

W. WICKHAM SMITH,
Special Assistant to the Attorney-General.

HENRY M. HOYT,
Solicitor-General.

FEBRUARY, 1907.

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No. 481.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

ADDISON JOHNSON, Agent and Warden of Sing Sing Prison,
Appellant,

vs.

CHARLES C. BROWNE.

Brief in Opposition to Motion to Advance.

Terence J. McManus,
BLACK, OLCOTT, GRUBER & BONYNGE,
Attorneys for Appellee.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1906.

ADDISON JOHNSON, Agent and Warden of Sing Sing Prison,
Appellant,

AGAINST

CHARLES C. BROWNE,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO ADVANCE.

It is the contention of the Government that the precise question involved here (*i. e.*, whether the treaty provisions with Great Britain or the decisions of this Court permit a person, duly convicted in the United States Courts before his flight, to go at large in the United States while awaiting trial on another offense for which he has been extradited) has never been passed upon by this Court.

This may be true. But it is the contention of the appellee that the question raised is an integral part of the broader question so fully and finally determined by this Court in the leading case of the United States vs. Rauscher, 119 U. S., 407.

Therefore, the doctrine of *stare decisis* must prevail.

The decision in the Rauscher case was based upon two distinct grounds:

(1) The provision in the treaty of 1842.

(2) Sections 5270 and 5275 of the Revised Statutes of the United States.

The Court said, in construing these sections:

> "The obvious meaning of these two statutes, "which have reference to all treaties of extradi- "tion made by the United States, is that the "party shall not be delivered up by this govern- "ment to be tried for any other offense than that "charged in the extradition proceedings, and that, "when brought into this country on similar pro- "ceedings, *he shall not be arrested* or tried for any "other offense than that with which he was "charged in those proceedings until he shall have "had a reasonable time to return unmolested to "the country from which he was brought."

These statutes have not been changed since the decision in the Rauscher case.

The treaty of 1889 has not even by implication repealed them.

On this point Judge HOUGH in his opinion, sustaining the writ, said:

> "They [the treaty provisions] do not purport to repeal or modify any law of the United States, and they are not inconsistent with the continued enforcement of Sections 5272 and 5275 of the revised statutes, which constitute a rule of conduct obligatory upon the officers of the United States whose conduct is here questioned."
>
> "It is, of course, true that a statute inconsistent with a treaty is repealed by implication. It is too clear for argument that there is no such implication in this instance. I am, therefore, of opinion that without further interpreting the language of the convention the governmental contention is untenable in the light of the above referred-to sections of the Revised Statutes as still authoritatively interpreted by the case of Rauscher. * * * As, however, I regard the general doctrine laid down in the case of Rauscher, as based upon existing statutes of

the United States, to be entirely conclusive of this matter, I need not pursue the consideration of the convention of 1889 further than to say that it appears to me very doubtful, in view of the provisions of article 7, that article 3 should be so construed as to permit either of the contracting parties to do so by indirection under that article what neither could do openly under article 7, and that I consider the insertion of the word "punished" in article 2 as more than a recognition of the historical fact that political offences are frequently punished without trial" (pp. 11 and 12, Record).

The courts have since repeatedly construed the Rauscher case and have often given broader latitude to that decision than was given to it by Judge HOUGH in the case at bar (*In re* Reinitz, 39 Fed. Rep., 204; *in re* Baruch, 41 Fed. Rep., 472; Hall vs. Patterson, 45 Fed. Rep., 352).

The spirit of the whole Rauscher decision, the analysis of the procedure under which extradition is effected, the construction which the Court has given to Sections 5272 and 5275 hereinabove referred to, indicate that a broader and larger view was taken by the Supreme Court than that which Mr. Smith would accord to it.

U. S. vs. Rauscher is absolutely controlling.

The question raised here has already been decided.

Therefore there is nothing disclosed by the motion papers which, it is respectfully submitted, justifies the advancement of this appeal.

Respectfully submitted,

BLACK, OLCOTT, GRUBER & BONYNGE,

Attorneys for Appellee.

W. M. K. OLCOTT,

TERENCE J. MCMANUS,

Of Counsel.

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No. 481.

In the Supreme Court of the United States,

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ADDISON JOHNSON, Agent and Warden of the State Prison of New York at Sing Sing, N. Y.,
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vs.

CHARLES C. BROWNE.

BRIEF FOR THE APPELLEE.

TERENCE J. McMANUS,
W. M. K. OLCOTT,
Of Counsel for Appellee.

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1907.

In the United States Supreme Court,

OCTOBER TERM, 1906.

No. 481.

ADDISON JOHNSON, Agent and Warden of the State Prison of New York at Sing Sing, N. Y.,
Appellant,

vs.

CHARLES C. BROWNE.

Brief for the Appellee.

The Appellee was indicted in the year 1903, by the Grand Jury for the Southern District of New York upon two charges:

I. Conspiracy to defraud the United States of duties upon imports.

II. Knowingly admitting the entry of goods, wares and merchandise upon the payment of less than the amount due thereon, in violation of Section 5444 of the Revised Statutes of the United States.

Upon the conspiracy charge, the appellee was duly tried and convicted on February 20th, 1904, in the Circuit Court of the United States for the Southern District of New York and sentenced to a term of imprisonment in Sing Sing prison (page 1 of Record).

Upon appeal, the conviction was affirmed and application for writ of certiorari to this Court was refused (page 8).

The appellee had been released on bail pending appeal, and when it was sought to execute the sentence, it was discovered that he had fled to Canada.

Thereupon extradition proceedings were instituted by the Government, demanding his surrender by the Canadian authorities upon the charge of conspiracy for which he had been so convicted.

The demand for the surrender upon that charge was refused on May 12th, 1906 (pages 1 and 8).

Immediately thereafter, a new demand was made, based upon the untried indictment for violation of Section 5444.

The Canadian Government honored this requisition, and on July 25th, 1906, the fugitive was surrendered to William Flynn, the duly appointed agent of the United States in that behalf (page 1).

While on his way from Canada to the City of New York, in custody of the Government agent, the fugitive was taken from the custody of said agent at Poughkeepsie, N. Y., by the Marshal for the Southern District of New York and lodged in Sing Sing prison under a commitment based upon the conspiracy conviction (pages 2 to 5).

Thereafter a writ of habeas corpus was issued out of the Circuit Court for the Southern District of New York, upon the petition of the said fugitive, alleging that his commitment to the custody of the appellant was in violation of law, was with-

out right, authority, or jurisdiction of any kind, and especially in violation of Article III and Article VII of the Treaty between the United States of America and Her Britannic Majesty, of July 12th, 1889.

The return to the writ shows that the fugitive was held and detained by virtue of the conviction upon the conspiracy charge (pages 5, 6 and 7).

Upon the hearing on the writ, it was contended on the part of the fugitive, that his detention was in violation of the treaty provisions; in violation of the rule laid down in the case of the United States against Rauscher, 119 U. S., 407; and in violation of Sections 5272 and 5275 of the Revised Statutes of the United States.

The Government's contention was, that under the true construction of the Rauscher case it was lawful to apprehend an escaped convict, even though at the time of apprehension he had been brought within the country solely by virtue of a demand in extradition wholly unconnected with the crime for which he had been convicted.

It was further contended by the Government that the right to seize convicts was especially secured by the terms of the supplemental extradition convention of 1889. Incidental to this latter contention, it was urged that the treaty of 1889, being subsequent to the enactment of Sections 5272 and 5275, abrogated those statutes, as well as avoided the effect of the doctrine laid down in the Rauscher case as based upon the right implied from the treaty of 1842 (pp. 8 and 9).

After argument the Court sustained the writ and discharged the fugitive from the custody of the appellant.

The effect of this discharge was to restore him to the custody of the agent named in the extradition

proceedings, from which custody he was subsequently discharged upon giving bail to answer the indictment on the charge upon which he had been extradited.

Mr. Justice Hough, in his opinion sustaining the writ, said, after a lengthy review of the authorities:

> "But these treaty provisions are primarily the obligations of the contracting governments each to the other. The do not purport to repeal or modify any law of the United States, and they are not inconsistent with the continued enforcement of Sections 5272 and 5275, Revised Statutes, which constitute a rule of conduct obligatory upon the officers of the United States whose conduct is here questioned.
>
> "It is, of course, true that a statute inconsistent with a treaty is repealed by implication. It is too clear for argument that there is no such implication in this instance.
>
> "I am therefore of the opinion that without interpreting the language of the convention, the government contention is untenable in the light of the above referred to sections of the Revised Statutes as still authoritatively interpreted in the case of Rauscher.
>
> "It is doubtless true that the insertion of the word "punished," in Article 3 of the convention would have rendered that instrument clearer, and the argument is not without force, that its omission is notable in view of its presence in many other extradition treaties negotiated with other nations at or about the same time. As, however, I regard the general doctrine laid down in the case of Rauscher, as based upon existing statutes of the United States, to be entirely conclusive of this matter, I need not pursue the consideration of the convention of 1889 further than to say that it appears to me very doubtful, in view of the provisions of article 7, that article 3 should be so

> construed as to permit either of the contracting parties to do so by indirection under that article what neither could do openly under article 7, and that I consider the insertion of the word "punished" in article 2 as no more than a recognition of the historical fact that political offences are frequently punished without trial."

From the order discharging the fugitive (page 13), the Government has appealed, alleging as assignments of error,

> "1. That the Circuit Court discharged petitioner herein from the custody of appellant on the ground that his detention was in violation of the treaty of extradition between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland concluded July 12th, 1889.
>
> 2. That the said Court did not remand the said petitioner to the custody of appellant to execute the sentence of the United States Circuit Court for the Southern District of New York pronounced on said petitioner on the 11th day of March, 1904" (p. 14).

That these assignments of error are wholly without merit, we will endeavor to establish.

POINT I.

The order appealed from was in complete accord with well settled principles of law, with treaty provisions and with the Statutes of the United States relating to the subject of extradition.

The decision of Mr. Justice Hough was in harmony with:

(A) The doctrine of the most eminent writers on the subject of international law;

(B) The treaty of 1842 with Great Britain, as supplemented by the treaty of 1889;

(C) The rule established by this Court in United States vs. Rauscher, 119 U. S., 407;

(D) The provisions of Sections 5272 and 5275 of the United States Revised Statutes;

(It also accorded with the settled practice of the State Department since the Rauscher decision).

A. The doctrine of writers on international law.

Almost all of the important authorities on the law of nations have held that, without a treaty stipulation, one government is not under any obligation to surrender a fugitive from justice to another government for trial.

Foelix, Droit. Int. Prive, II Sec. 608; Twiss, Law of Nations, Time of peace, ed. 1884, Sec. 238; Phillimore, 3rd ed., I. 517; Creasy, Int. Law, 202; Lewis, For. Juris. 37; Pomeroy, Int. Law, Woolsey's ed (1886), 236; Lawrence's Wheaton (1863), 233.

"The law of nations embraces no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place."

Mr. Rush, Sec. of State to Mr. Hyde de Neuville, Apr. 9, 1817, M.S. notes to For. Leg. II., 218.

And also see:

Mr. Webster, Sec. of States to Mr. d'Argaiz, June 21, 1842. Webster's Works VI., 399-405.

This Court, in United States vs. Rauscher *supra*, so states the rule to have been saying:

"Prior to these treaties and apart from them, it may be stated as the general result from the writers upon international law, that there was no well defined obligation on one country to deliver up such fugitives to another, * * * and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law."

Hence, the right to surrender rests, as between two sovereign governments, exclusively upon treaty provisions.

When treaty stipulations have been entered into,

the same writers and many others of equal authority hold that when a fugitive has been surrendered to the demanding government, he shall be tried only for the specific offense for which his surrender was granted, and that in the event of his not being tried for that offense, or having been tried and acquitted thereon, he is entitled to a reasonable time to leave the country before being arrested upon any other charge of crime alleged to have been committed prior to his extradition.

> 1 Moore on Extradition, p. 255; Billot. Traite de l'Extradition, 308; Field's Int. Code, §237; Wharton Conf. of Laws, §846.

In the United States this doctrine has now acquired the dignity of well settled law, this Court having held that

> "Upon a review of these decisions of the Federal and State Courts, to which may be added the opinions of the distinguished writers which we have cited * * * we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the Court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in the treaty and for the offense with which he is charged in the proceedings for his extradition until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."
>
> U. S. v. Rauscher, *supra.*

And see

Cosgrave vs. Whinney, 174 U. S., 63; Ex. P.

Ex. P. Coy, 32 F. R., 911; Peo. vs. Stout, 81 Hun, 336.

The exemption has also been held to extend to arrest in civil cases.

In re Reinitz, 39 Fed. Rep., 204.

(B) THE TREATIES WITH GREAT BRITAIN.

(1) *The Treaty of 1842*

was entitled

"A Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave Trade and for the Giving up of Criminals, Fugitives from Justice in Certain Cases."

With relation to the subject of extradition it provided:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requitions, by them or their ministers officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be

> found, would justify his apprehension and commitment for trial if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

It was wholly barren of any provision limiting the right of trial to the offense for which extradition was granted.

Notwithstanding this omission, this Court said, in construing the treaty in the Rauscher case:

> "It is therefore very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it had not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject."

As to the view that

> "No matter by what contrivance or fraud or by what pretense of establishing a charge

provided for by the extradition treaty, he may have been brought within the jurisdiction, he is when here liable to be tried for any other offense," the Court said:

"This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself. The caption of the treaty, already quoted,, declaring that its purpose is to settle the boundary line between the two governments; to provide for the final suppression of the African slave trade; adds, 'and for the giving up of criminals, fugitives from justice, *in certain cases.*' The treaty, then, requires, as we have already said, that there shall be given up, upon requisitions respectively made by the two governments, all persons charged with any of the seven crimes enumerated; and the provisions giving a party an examination before a proper tribunal, in which, before he shall be delivered up on this demand, it must be shown that the offense for which he is demanded is one of those enumerated, and that the proof is sufficient to satisfy the Court or magistrate before whom this examination takes place that he is guilty, and such as the law of the State of the asylum requires to establish such guilt, leave no reason to doubt that the fair purpose of the treaty is that the person shall be delivered up to be tried for that offense and for no other."

(2) *The Treaty of 1889*

is entitled:

"Extradition Convention Between the United States and Her Britannic Majesty, *Supplementary* to the Tenth Article of the Treaty, Concluded Between the Same High Contracting Parties on the Ninth Day of August, 1842."

The provisions of the treaty which are pertinent to the question under discussion are as follows:

"WHEREAS, by the Tenth Article of the Treaty concluded between the United States of America and Her Britannic Majesty on the ninth day of August, 1842, provision is made for the extradition of persons charged with certain crimes;

"AND WHEREAS, it is now desired by the high contracting parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention."

* * * * * * * * * * * * * *

"ARTICLE II. A fugitive criminal shall not be surrendered if the offense in respect of which his surrender be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.

"No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

"If any question shall arise as to whether a case comes within the provisions of this Article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

"ARTICLE III. NO PERSON SURRENDERED BY OR TO EITHER OF THE HIGH CONTRACTING PARTIES SHALL BE TRIABLE OR TRIED FOR ANY CRIME OR OFFENSE, COMMITTED PRIOR TO HIS EXTRADITION, OTHER THAN THE OFFENSE FOR WHICH HE WAS SURRENDERED, UNTIL HE SHALL HAVE HAD AN OPPORTUNITY OF RETURNING TO THE COUNTRY FROM WHICH HE WAS SURRENDERED.

* * * * * * * * * * * * * *

"ARTICLE VI. THE EXTRADITION OF FUGITIVES UNDER THE PROVISIONS OF THIS CONVENTION AND OF THE SAID TENTH ARTICLE SHALL BE CARRIED OUT IN THE UNITED STATES AND IN HER MAJESTY'S DOMINIONS, RESPECTIVELY, IN CONFORMITY WITH THE LAWS REGULATING EXTRADITION FOR THE TIME BEING IN FORCE IN THE SURRENDERING STATE.

"ARTICLE VII. The provisions of the said Tenth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefore shall not have been executed.

"In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers."

Article VI of the treaty considered in conjunction with Article III is absolutely conclusive of the proposition that no change in the scope of the procedure regulating the apprehension or detention of fugitives was intended.

A consideration of this Article gives additional force to the conclusion of Mr. Justice Hough that:

"There is no authority of or within these United States having any right or power to seize, arrest, confine or detain any person extradited in pursuance of treaty provisions and for a specific offense, crime or cause whatsoever (committed or existing before his extradition) except for that specific offense, crime or cause by reason of which the extradition has been granted; and further, that this doctrine rests not only nor principally upon the civil rights or personal privileges of a fugitive criminal who has ben returned in ac-

> cordance with an increasingly civilized international law, but upon the highest grounds of national honor, imposing upon this government and upon all persons subject to its rule the obligation to deal with the human being entrusted to them by a friendly foreign power *only with respect of the matter by reason of which he was so entrusted.*" (Page 12 of Record).

C. THE RULE ESTABLISHED IN THE RAUSCHER CASE.

need not be especially adverted to here, except to say that the entire discussion will show that Judge Hough's decision is not alone in accord with that decision, but that fundamentally it rests in part upon the same foundation, to wit: the controlling authority of Sections 5272 and 5275 of the Revised Statutes of the United States.

D. SECTIONS 5272 AND 5275 OF THE UNITED STATES REVISED STATUTES.

While Section 5272 regulates the method of delivery of a fugitive upon the demand of a foreign government, it is nevertheless important as showing the view taken by Congress of the scope and purpose of surrender. It reads:

> "It shall be lawful for the Secretary of State under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized in the name of and on behalf of such foreign government *to be tried for the crime of which such person shall be accused*, and such person shall be delivered up accordingly."

For the protection and security of persons surrendered to this government Section 5275 says:

> "The President shall have power to take all necessary measures for the transportation and safe keeping of such accused person, and for security against lawless violence until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States or of the Militia thereof, as may be necessary for the safe keeping and protection of the accused."

This Court says, construing these two Sections in the Rauscher case:

> "The obvious meaning of these two statutes which have a reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; *and that when brought into this country upon similar proceedings he shall not be arrested* or tried for any other offense than that with which he was charged in those proceedings until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties, such as the one we have under consideration, and whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings."

THE VIEWS AND PRACTICE OF THE DEPARTMENT OF STATE.

The decision is also in line with the views which have obtained in the Department of State since the Rauscher decision, and especially since the enactment of the Treaty of 1889. In other words, the State Department has, in respect at least to extradition procedure with Great Britain, held that:

> "In regard to other matters occurring previous to extradition he (the fugitive) was not to be regarded as being subject to the jurisdiction of the government which obtained his surrender until he should have had an opportunity to return to the jurisdiction of the surrendering government."
>
> Vol. 4, Moore's International Law Digest, page 315.

This contention was advanced by the Department of State in the case of Leda La Montagne, who had been extradited to Canada on a charge of arson, and detained in jail in Canada without trial on a commitment for contempt of Court for refusing subsequent to her extradition, to testify against her brother, who was afterwards convicted on a charge of murder. It was urged by the Department of State that her extradition was obtained for the purpose of using her as a witness, rather than prosecuting her on a charge of arson.

> "Should this be the case, it constituted, said the Department of State, an abuse of extradition process which it was not supposed that Her Majesty's governent would countenance. But there was, said the Department, another aspect of the case, namely, the bearing of the provision of the convention of July 12, 1889,

prohibiting trial for any other than the extradition offense. *The insertion of this stipulation was first entertained by the United States on the urgent demand of the British Government;* but, even before it was adopted, the Supreme Court of the United States, acquiescing in the contention of the British Government in the Winslaw case, decided in the case of Rauscher, in 1886, that a fugitive delivered up under a treaty for one offense could not be tried for another.

"The British Minister, in a note of June 27, 1891, stated that the prisoner was detained as alleged, but that it was the intention of the authorities to try her for the offense for which she was surrendered, and he pointed out that the offense for which she was sentenced was committed subsequently to her extradition.

"The Department of State, July 11, 1891, replied that, while this was true, the question at issue was whether in refusing to answer the question put to her Leda La Montagne did not stand under the protection of the treaties; *that the stipulation in the convention of 1889 against trial for another offense was understood to signify that the fugitive was delivered up for the sole purpose of being tried for the offense for which the extradition was granted, and that in regard to other matters occurring previously to extradition he was not to be regarded as being subject to the jurisdiction of the government which obtained his surrender till he should have had an opportunity to return to the jurisdiction of the surrendering government.* On this principle the Courts of the United States had lately, said the Department, refused to permit an extradited person to be served with process or be detained in civil proceedings."

Vol. IV, Moore's Int. Law Digest, p. 314.

The same view is reiterated in a letter from Mr. Uhl, Acting Secretary of State, to Mr. Hanford,

April 21, 1894, 196 M. S. Dom. Let. 443, Vol. IV, Moore's Int. Law Digest, page 316, where he says:

> "I have received your letter of the 18th instant in further reference to the case of Charles Young, who was recently extradited from England.
>
> "In reply I have to say that, since the decisions of the Supreme Court in the Rauscher case, *it is believed by the Department to be well settled that a fugitive secured by extradition can neither be lawfully tried nor punished except for the offense for which his extradition was granted.* And this rule holds good notwithstanding the offense for which it was proposed to try or convict him be included in that for which his extradition was granted, unless the former is also included in the treaty, which is not the case here.
>
> "It is proper to say that this is also the view taken by the British Government."

Upon a review of these various sources of opinion and authority, it is confidently asserted that no other decision than that which Judge Hough rendered, could have been rendered upon the facts and under the law.

POINT II.

Neither the British "Extradition Act of 1870" nor Section 5275 of the United States Revised Statutes has been revoked, abrogated or even modified, by the treaty of July 12, 1889. Section VI of that Treaty is manifestly an unequivocal ratification of the controlling authority of the existing statutory procedure regulating extradition in both countries.

The appellant urges that in discharging the petitioner upon the ground "that his detention was in violation of the treaty of extradition between the United States of America and Her Majesty, Queen of the United Kingdom of Great Britain and Ireland, concluded July 12, 1889," error was committed. (Page 14 of Record.)

His contention must necessarily be based upon the assumption that the treaty of 1889 repealed, abrogated or modified, either expressly or by implication, some provision of the prior treaty of 1842, or the provision of Sections 5272 and 5275 of the Revised Statutes, or the British Extradition Act then in force, to wit: the act of 1870.

The language employed in Article VI of the treaty, however, is so clear, perspicuous and direct as to leave absolutely no room whatever for such contention. It says:

"The extradition of fugitives under the pro-

> vision of this convention and of the Tenth Article shall be carried out in the United States and in Her Majesty,' dominions, respectively, *in conformity with the laws regulating extradition for the time being in force in the surrendering country.*"

These words are plain and unambiguous as the English language can make them. A literal interpretation of them is all that is required in order to show the absolute unsoundness of the appellant's contention.

Now, what law regulating extradition (was) for the time being (July 25, 1906, the date of surrender) in force in the surrendering state? (Great Britian in this instance).

The "British Extradition Act of 1870" was, at the time the treaty of 1889 was executed, also at the time the surrender was effected, and is now as far as counsel has been able to ascertain, the law regulating extradition in force in Great Britian.

It provides, in subdivision 2 of Article III, that

> *"A fugitive shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be* **detained,** *or* tried in that foreign state for any offense committed prior to his surrender than the extradition crime proved by the facts on which the surrender is grounded."

This statute, being in force at the time of surrender, is to be given the same effect as if it had been set out *in haec verba* in the treaty.

See U. S. vs. Texas, 162 U. S., 1, 37.

Coupling the treaty and the statute, we find the intention of the parties to have been just that

which the respondent contends for, namely, that, when a fugitive was surrendered, the demanding government only acquired jurisdiction for the sole purpose of trying him for the offence for which his surrender had been granted and that as to all other matters occurring previous to extradition, he was not to be regarded as subject to jurisdiction of the demanding government until after his failure to return to the asylum country within a reasonable time after the disposition of the extradition charge.

The same conclusion would follow, if the situation were reversed. In other words, if Great Britain were the demanding State, and the United States the surrendering State, Great Britain would have, under the stipulation of Article VI, to observe the requirements of Sections 5272 and 5275, as interpreted in the Rauscher case and dispose of the extradition charge before any other action could be taken; and even then no other action could be taken until after the failure of the fugitive to take advantage of a reasonable opportunity to return to the asylum state.

The status of the fugitive, whether convict, debtor or any other, was inconsequential. He could not be DETAINED for any other purpose than that for which he had been surrendered. The contention, therefore, that the treaty of 1889 does anything except expressly ratify Section 5275, as well as the British Extradition Act, does violence to the language employed and is, in a word, *reductio ad absurdum*.

POINT III.

The implied repeal of a Federal statute by a subsequent treaty provision is not to be favored.

The rule that a repeal of a statute by implication is not to be favored, is even more rigid when it is sought to make a subsequent treaty provision the basis for such a construction.

Even where the language is explicit and express as to the repeal of a statute by a treaty provision, this Court has manifested reluctance about giving to a treaty the effect of a repeal.

> See Ware vs. Hillton, 3 Dall., 199;
> Haeunstein vs. Lynham, 100 U. S., 483.

This Court has also held that

> "A statute enacted by Congress expresses the will of the people in the most solemn form. If not repugnant to the Constitution it is by that instrument the supreme law of the land, and should never be held to be displaced by a treaty subsequently concluded unless it is impossible for both to stand together and be enforced."
>
> U. S. vs. Lee Yen Tai., 185 U. S., 213, 222.

> "When the two (treaty and statute) relate to the same subject, the Courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."
>
> Whitney vs. Robertson, 124 U. S., 191-94.

Assuming for the moment that the treaty of 1889 had never been concluded, it is clear that the arrest and detention of Browne would have been illegal under § §5272 and 5275 as interpreted in the Rauscher case.

But appellee has shown, we think conclusively, that Article VI of the treaty is a ratification of those statutes as well as of the doctrine enunciated in construing them.

Therefore, to sustain its contention, the government must look elsewhere in the treaty to find some clause which evidences an intention to limit the effect of Article VI as well as to repeal or modify the statutes and decision which otherwise would be controlling.

It claims to have found such intention in Articles II and III of the treaty of 1889; and absolutely ignoring the express requirements of Article VI, advances a contention which is wholly untenable, *i. e.*, that the logical deduction to be drawn from the omission of the word "punished," in Article III, following its inclusion in Article II, is, that the rights which we are bound to accord to persons accused, are to be denied to persons convicted of other offenses, committed prior to surrender.

Ignoring, for the moment, the existence of Article VI, and considering the provisions of Articles II and III, we deny that the premises justify the conclusion, for the following reasons.

The Constitution says that a treaty is a "supreme law of the land."

Therefore, in construing it, we have, (in addition to the right to refer to the preliminary treaty negotiations), the right to look to, not only "all parts of the act (treaty) itself * * * but

also to the condition and history of the law as previously existing and in the light of which the new act (treaty) must be read and interpreted."

U. S. vs. Wong Kim Ark, 169 U. S., 649.

Construing Article III in the light of preliminary diplomatic negotiations and pre-existing law, it is manifest that instead of modifying or repealing the earlier enactments and doctrine, Article III was intentionally declaratory of them.

The Article in question is precisely assertive of the position which Great Britain has consistently maintained since February, 1876, when the discussion in the celebrated Winslow case (referred to in the Rauscher decision) arose.

In the Winslow case the surrender of the fugitive was demanded in February, 1876, by this government from Great Britain, upon charges of forgery. Extensive diplomatic negotiation was had between the two countries, involving the giving or refusal to give a preliminary pledge from our government that it would not try the fugitive for any other offense than that for which he was extradited. Mr. Fish, Secretary of State, refused to give such pledge, and refused to accede to the doctrine that a person extradited could only be tried for the commission of the offense for which extradition was granted. The negotiations between the two countries were inconclusive in that Winslow was not delivered.

Following this, however, the Rauscher case was decided on December 6, 1886. It is reasonable to assume that Article III of the treaty was a ratification of the views which following that decision were accepted by both governments as to the scope and purpose of a surrender in extradition proceedings.

We find further confirmation of the consistency of the British position as well as the intention to make the treaty stipulation declaratory of existing law, in the attitude of the State Department, in the case of Leda La Montagne, where on July 11th, 1891, in a letter from Mr. Wharton, Acting Secretary of State, to Sir J. Pauncefote, British Minister (Vol. IV, Moore's Int. Dig., p 315) it was maintained that the stipulation in Article III was understood to signify that in regard to other matters occurring previously to extradition he (the fugitive) was *not to be regarded as being subject to the jurisdiction of the government which obtained his surrender till he* should have had an opportunity to return to the jurisdiction of the surrendering government.

And see

Letter of Mr. Adee, Acting Secretary of State, to Sir J. Pauncefote, May 19th, 1891 (M. S. Notes to Gt. Britain XXI, 49, IV Moore's Int. Dig., p. 314), where it was stated that this stipulation (Art. III) was inserted "on the urgent demand of the British government."

It is therefore clear that the omission of the word "punished" was not had for the reasons asserted by the government.

It is further asserted that its omission, in view of the surrounding circumstances, had no significance whatever except such as Judge Hough gives to its inclusion in Article II, i. e., that it was no more than a recognition of the historical fact that "political offenses are frequently punished without trial" (p. 12).

The appellant therefore most earnestly contends that only by doing violence to well settled rules of construction, as well as ignoring the historical

facts surrounding the making of the compact, and the diplomatic negotiations that led up to it, can the contention advocated by the government be maintained by this Court.

IV.

In answer to the Government's argument.

A.

The respondent notes with astonishment that in its brief to be submitted on the argument of this appeal, the government absolutely ignores the existence of Article VI of the Treaty of 1889, notwithstanding the controlling importance of that provision.

It well says, however, citing the authority of U. S. v. Texas, 162 U. S., 137, that the intention of the parties is to be gathered from an examination of the entire instrument.

Therefore, Article VI relating as it does, directly to the subject in hand, the failure to consider this all important provision, or even to revert to it, is all the more extraordinary and unaccountable. It could not have been overlooked. It must have been ignored advisedly. That this is probably the correct view of the Government's action, or rather lack of it, is easily demonstrated by applying the doctrine of U. S. v. Texas, as above enunciated, to the questions discussed herein.

By applying that doctrine we find that:

The Treaty of 1889 was not an original compact.

It was expressly declared to be "Supplementary to the Tenth Article of the Treaty" of 1842.

Therefore, under all the rules of construction, it is to be considered in conjunction with that Treaty, and with the cases in which the meaning of its terms was judicially determined.

Considering all together, the treaties, the decisions of this Court, the Statutes which regulate the procedure (and which under the treaty of 1889 have controlling force), they present a complete harmonious and consistent document. They manifest the intention of the parties clearly and without ambiguity.

There is neither occasion, nor justification for resorting to other treaties, with other countries to determine the exact, the literal intention of the parties, that intention manifestly being, to ratify the views as to scope and purpose of surrender as heretofore expressed by this Court, and expressed in the British Extradition Act above referred to

The appellant also urges the necessity of adhering to the plain meaning of the language of treaties.

Also that:

> "Treaties are the product of extended and careful negotiations."

To both of these expressions the respondent gives his heartiest assent.

With regard to the first, it is confidently asserted that by following this rule in the interpretation of the treaty in question, the contention he advances, must be adopted by this Court.

As to the second expression, the respondent has shown, to some extent, the course of these "extended and careful negotiations," which preceded the execution of the Treaty in question. They are proper subjects of investigation to arrive at the intention of the parties. Our investigation has shown that intention to be, as it is expressly declared, to wit, to effect surrender in accordance with existing law.

It is also urged by the appellant that if the language of the Treaty did not have the plain meaning attributed to it, it could have been amended during the negotiations between Mr. Hay and Lord Pauncefoote, terminating in the Treaty of 1902.

The appellant has apparently overlooked the fact that up to the present assertion of a contrary view, the view of the State Department had been completely in accord with that which Judge Hough adopted and which the respondent is here to advocate, to wit, that under the Treaty of 1889, the fugitive could not be *punished* for any other than the extradition offense.

(See Point I, Letter of Mr. Uhl.)

There was therefore no reason to change the language of the Treaty when both parties were of the same mind as to the meaning of the language employed.

B.

In merely seeking to determine the meaning of Article III by construing it in the light which the phraseology of Article II casts upon it, the government has violated the hard and fast rule of U. S. vs. Texas, *supra*, which it has invoked as being authoritative in determining the correct solution of the treaty questions involved in this case.

It is most respectfully insisted that Article III cannot be so construed without violating the rule of U. S. vs. Texas. It is contended that to ascertain the exact meaning and intention of the parties, it is necessary to consider the stipulations of Article VI and VII in conjunction with Article III.

Examining Article III from this view point, it is plain that the contention of the government is wholly without force.

The authority of Article III over the subject is by no means exclusive. Article VI is of equal importance in relation to the question of surrender.

We fail to see the relevancy of the governments, argument, based upon the assumption that if Great argument based upon the assumption that if Great Britain were to demand the surrender of the fugitive upon a charge of forgery or other extradition crime, could such person demand his discharge on habeas corpus by offering to prove that the real intent of Great Britain was to punish him for another non-political offense?

It is frankly admitted that discharge could not be demanded on such a ground. If such a demand were made the Court would undoubtedly say that the question was one over which another department of the government had control.

And, more than likely, if such a question arose

in any case where demand was made by Great Britain, the State Department could be relied on to protect the interests of the fugitive as it did in the case of Leda Lamontagne, to which respondent has more than once referred.

C.

The government urges at one place that the meaning of the treaty is so plain, unequivocal and unabiguous as to neither require nor permit the in order to ascertain the plain meaning of the terms employed?

Then, why expound as to the meaning of the obvious?

But above and beyond this, why resort to a rule of construction which in view of the language employed, is absolutely useless as a means of determining the question at hand.

The words of the treaty having a plain meaning, it is clear that if any rules are required to make that meaning even more obvious, "the same rules of construction and course of reasoning which we apply to the interpretation of private contracts" should be employed.

Tucker v. Alexandroff, 183 U. S., 424, 437.

These are the rules which Judge Hough employed in elucidating the question.

The terminology of other treaties throws absolutely no light on the question at issue.

The Treaty of 1889 speaks for itself.

D.

The Rauscher case has settled for all time, at least

until a statute or treaty amendatory thereof is passed or entered into, and declared the rule to be, that jurisdiction is acquired only for the take advantage of opportunity to leave, the jurisdiction, after that charge is disposed of. The government's analyses has not served to make reasonable, any other view of that decision.

Conclusions.

The respondent maintains that his arrest and incarceration was, as has been stated, in violation of settled law and treaty provisions. It is urged that his seizure was an employment of that "lawless violence" which Congress solemnly pledged itself to prevent.

The Court will not be unmindful of the fact that the honor of the United States is involved herein, It has ever been scrupulous to maintain the high standard of honor which a free and enlightened government, such as ours, should follow.

A question of merely public policy, is not of consequence where a breach of national honor is involved. The view of this question advocated by the appellant cannot be sustained without violating the compact which our government has solenmly pledged itself to obey.

It is respectfully submitted that the order appealed from should be affirmed.

Respectfully submitted,

W. M. K. OLCOTT,
TERENCE J. McMANUS,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 481.

ADDISON JOHNSON, AGENT AND WARDEN OF THE STATE PRISON OF THE STATE OF NEW YORK AT SING SING, N. Y., APPELLANT,

vs.

CHARLES C. BROWNE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Supreme Court of the United States.

No. 481.—October Term, 1906.

Addison Johnson, Agent and Warden of the State Prison of the State of New York at Sing Sing, N. Y., Appellant, *vs.* Charles C. Browne.	Appeal from the Circuit Court of the United States for the Southern District of New York.

[April 8, 1907.]

The respondent sued out a writ of *habeas corpus* from the Circuit Court of the United States for the Southern District of New York, directed to the agent and warden of the State Prison at Sing Sing, in the State of New York, where he was confined, and pursuant to the terms of the writ the respondent was brought before that court in New York city, and after a hearing the court ordered his discharge. The agent and warden has appealed to this court from that order.

The facts appearing on the hearing before the Circuit Court on the return to the writ were these:

The respondent was an examiner of silks in the appraisers' department in the port of New York, and in the spring of 1903, in the Circuit Court of the United States for the Southern District of New York, a grand jury found two indictments against him, one being found against him jointly with two others for conspiring to defraud the United States in violation of section 5440 of the Revised Statutes; and the other was against him alone for knowingly attempting to enter certain Japanese silks upon payment of less than the amount of legal duty thereon, in violation of section 5444, Revised Statutes.

In January, 1904, he, in company with one of the others named in the indictment, (the other having fled the jurisdiction,) was tried in the Circuit Court of the United States for the Southern District of New York upon the indictment charging them with conspiracy. He was convicted and sentenced to imprisonment in the State Prison at Sing Sing, N. Y., for two years.

He appealed to the Circuit Court of Appeals for the Second Circuit, where the conviction was affirmed, and thereafter an application was made in his behalf to this court for a certiorari to review the judgment of conviction, which application was denied in January, 1906.

After his trial and conviction, and pending a review of the judgment, the respondent had been enlarged on bail, and after the judgment was affirmed in the Circuit Court of Appeals and a certiorari from this court had been denied he was, on the 19th of January, 1906, duly called in the Circuit Court to submit himself to sentence, but did not appear, and his default was entered.

A few days subsequently he was found in the Dominion of Canada. This Government then instituted extradition proceedings in Montreal to procure his rendition upon the judgment of conviction of conspiracy to defraud the United States, and claimed it was an extraditable crime under the fourth subdivision of article I of the treaty or "extradition convention" of 1889, between the United States and Great Britain. That subdivision reads as follows:

"4. Fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any company made criminal by the laws of both countries."

The respondent was held for extradition by the Canadian commissioner, but, on writ of *habeas corpus*, the Court of King's Bench held that the conspiracy to defraud the United States, as set forth in the indictment upon which respondent was convicted, was not such a fraud as was provided for in the subdivision of the article of the treaty above referred to. Extradition was therefore refused.

Thereupon the United States secured the rearrest of the respondent on another complaint, charging him with the offenses for which he had been indicted under section 5444 of the Revised Statutes, and for which he had not been tried in New York. The Canadian commissioner held the respondent upon that complaint, and ordered his extradition, and, upon a writ of *habeas corpus*, the Court of King's Bench affirmed that order; and the respondent was then surrendered to the proper agent of the United States, who at once took him to the State of New York, and, having arrived within the Southern District of that State, the marshal of that district, proceeding under the warrant for imprisonment issued by the Circuit Court upon the conviction of the respondent on the conspiracy indictment, took possession of him and delivered him into the custody of the warden of Sing Sing Prison, there to be imprisoned for two years according to the sentence imposed upon him under the conviction as stated.

The respondent then obtained this writ upon a petition setting forth the above facts, and claimed that his imprisonment was in violation of the third and seventh articles of the extradition treaty between the United States and Great Britain. (26 Stat. 1508.) The warden of the prison made return August 7, 1906, that he held the respondent by virtue of the final judgment of the Circuit Court of the United States for the Southern

District of New York, rendered on the 9th of March, 1904, as above set forth.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

It does not appear that any movement has been made or notice given by this Government to try the respondent on the indictment for the crime for which he has been extradited, but his imprisonment in Sing Sing Prison is upon a conviction of a crime for which the Canadian court had refused to extradite him, and is entirely different from the one for which he was extradited. In other words, he has been extradited for one offense and is now imprisoned for another, which the Canadian court held was not, within the treaty, an extraditable offense.

Whether the crime came within the provision of the treaty was a matter for the decision of the Dominion authorities, and such decision was final by the express terms of the treaty itself. (Article 2, Convention of July 12, 1889, 26 Stat. 1508; United States Treaties in Force April 28, 1904, pages 350, 351.)

We can readily conceive that if the Dominion authorities, after the Court of King's Bench had decided that the crime of which respondent had been convicted and for which extradition had been asked was not extraditable, and the request for extradition had, therefore, been refused, had been informed on the subsequent proceeding for extradition on the other indictment that it was not the intention of this Government to try respondent on that indictment, but that having secured his extradition on that charge, it was the intention of this Government to imprison him on the judgment of conviction, they would have said that such imprisonment would not be according to the terms of the treaty, and they would have refused to direct his extradition for the purpose stated.

Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment, which depends upon the treaty between this Government and Great Britain, known as the Ashburton treaty of 1842, (8 Stat. 572–6, Art. 10,) and the subsequent one, called a convention, concluded in 1889, and above referred to.

The treaty of 1842 had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, and yet this court held that there was such a limitation, and that it was to be found in the "manifest scope and object of the treaty itself;" that there is "no reason to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other." (*United States* v. *Rauscher*, 119 U. S. 407, 422, 423.)

Again, at the time of the decision of the Rauscher case there were in existence sections 5272 and 5275 R. S. (3 Comp. Stat. p. 3595), both of which are cited and commented upon in that case, and in the course of the opinion of Mr. Justice Miller, at page 423, he said:

"The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this Government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a Congressional construction of the purpose and meaning of extradition treaties, such as the one we have under consideration, and, whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

"That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition."

Mr. Justice Gray, page 433, in his concurring opinion, places that concurrence upon the single ground that these sections clearly manifest the will of the political department of the government in the form of an express law that the person should be tried only for the crime charged in the warrant of extradition, and he should be allowed a reasonable time to depart out of the United States before he could be arrested or detained for any other offense. Both grounds were concurred in by a majority of the whole court.

If the question now before us had arisen under the treaty of 1842 and the sections of the Revised Statutes above mentioned, we think the proper construction of the treaty and the sections would have applied to the facts of this case and rendered the imprisonment of the respondent illegal. The manifest scope and object of the treaty itself, even without those sections of the Revised Statutes, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.

It is true that the tenth article of the treaty contained no specific provision for delivering up a convicted criminal, but if otherwise delivered, he could not have been punished upon a former conviction for another and different offense.

The claim is now made on the part of the Government that "the manifest scope and object of the treaty" of 1842 are altered and enlarged

by the treaty or convention of July 12, 1889. The second, third, sixth and seventh articles of that convention are set forth in the margin.*

It will be perceived that the second article provides that no person surrendered shall be triable or tried, *or be punished*, for any political crime or offense, while article three provides that no person surrendered shall be triable or be tried (leaving out the words "or be punished") for any crime or offense committed prior to the extradition, other than the offense for which he was surrendered, until he shall have had an opportunity for returning to the country from which he was surrendered. Hence it is urged that, as punishment for another offense of which the person had been convicted is not in so many words expressly prohibited in and by article three, a requisition may be obtained for one crime under that article, and when

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*Article II.

A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.

No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

Article III.

No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

Article VI.

The extradition of fugitives under the provisions of this convention and of the said tenth article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

Article VII.

The provisions of the said tenth article and of this convention shall apply to persons convicted of crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

possession of the person is thus obtained, he may be punished for another and totally different crime of which he had been convicted before extradition.

We do not concur in this view. Although if the words "or be punished" were contained in the third article the question in this case could not, of course, arise, yet we are satisfied that the whole treaty, taken in connection with that of 1842, fairly construed does not permit of the imprisonment of an extradited person under the facts in this case.

The mere failure to use these words in the third article does not so far change and alter "the manifest scope and object" of the two treaties as to render this imprisonment legal. The general scope of the two treaties makes manifest an intention to prevent a State from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then having obtained possession of his person to use it for another and different purpose. Why the words were left out in the third article of the convention of 1889, when their insertion would have placed the subject entirely at rest, may perhaps be a matter of some possible surprise, yet their absence cannot so far alter the otherwise plain meaning of the two treaties as to give them a totally different construction.

In addition to the provisions of the treaty of 1889 we find still in existence the already-mentioned sections of the Revised Statutes, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return unmolested from the country to which he was brought.

It is argued, however, that the sections in question have been repealed by implication by the treaty or convention of 1889, and that the respondent, therefore, cannot obtain any benefit from them. We see no fair or reasonable ground upon which to base the claim of repeal. Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty. (*United States* v. *Lee Yen Tai*, 185 U. S. 213.) If both can exist the repeal by implication will not be adjudged. These sections are not incompatible with the treaty or in any way inconsistent therewith. We find nothing in the treaty which provides that a person shall be surrendered for one offense and then that he may be punished for another, such as is the case here. The most that can be asserted is that an inference to that effect perhaps might be drawn from the absence in article 3 of positive language preventing such punishment. But that slight and doubtful inference, resting on such an insufficient foundation, is inadequate to overcome the positive provisions of the statute and the otherwise general scope of both treaties, which are inconsistent with the existence of such right.

It is urged that the construction contended for by the respondent is exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, and should not, therefore, be adopted. While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense. Especially should this be the case where the government surrendering the person has refused to make the surrender for the other offense on the ground that such offense was not one covered by the treaty.

Our attention has been directed to various other treaties between this Government and other nations, where provision is expressly made in regard to punishment. They frequently provide that no person shall be triable or tried "or be punished" for any other offense than that for which he was delivered up until he has had an opportunity of returning to the country from which he was surrendered. But because in some of the treaties the words "or be punished" are contained we are not required to hold that in the case before us the absence of those words permits such punishment, when that construction is, as we have said, contrary to the manifest meaning of the whole treaty, and also violates the statutes above cited. The order of the Circuit Court is

Affirmed.

Mr. Justice MOODY did not sit in the case and took no part in its decision.

True copy.

Test:

Clerk Supreme Court U. S.